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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

ANNA M. TIBBALS AND JOHN J. SPRIGGS, *Petitioners,*

VS.

MICA MOUNTAIN MINES, INC., A CORPORATION, AND WALLACE M. CLINGER, JOHN L. MUNSON, AND PAULINE C. EGLI, AS TRUSTEES OF SAID CORPORATION AND AS INDIVIDUALS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners hereby petition for review upon writ of certiorari a judgment of the United States Court of Appeals, Tenth Circuit, rendered Feb. 2, 1949, and respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED

In said judgment (R. 54) the court affirmed a judgment of the U. S. District Court of Wyoming (R. 41-2) granting respondents, defendants below, Summary Judgment on Motion (R. 24) supported by affidavit of counsel (R. 25-32),

and dismissed the action of petitioners and taxed costs against them.

PLEADING BELOW

The complaint (R. 1-6) is in two causes of action. The first cause (R. 1-4) is for a trespass committed Feb. 1, 1946, a law action, with secondary incidental relief asking injunction, damages and accounting. The second cause (R. 4-6) was simply ejectment, a law action, wherein the legal title is the issue, and not equitable title, and is supported by plaintiffs' court deed (*Mathews v. Neffy,* 13 Wyo. 458, 81 Pac. 304). If possession be claimed under a VALID lease, the owner shows expiration or forfeiture of the lease (*Allen v. Houn,* 30 Wyo. 186, 219 Pac. 1 c. 580). Damages and accounting were also asked. Diversity of citizenship, and federal questions alleged, including that plaintiffs were denied their property without due process of law, and were denied the equal protection of the law under the 14th Amendment to the U. S. Constitution; and also under the Civil Rights Acts of Congress.

The answer admitted diversity of citizenship, and entry on and possession of, and intent to continue to hold and mine the premises; denied plaintiffs' ownership and right of possession. For a first affirmative defense plead the statute of limitations (R. 8); and for Second Affirmative defense (R. 8-10) alleged that in 1935 the District Court of Fremont County, Wyo., adjudged that Graham, receiver of Midwest Mines Corporation WAS THEN ENTITLED TO POSSESSION of the premises, and that this decision was affirmed by the state supreme court in 61 Pac. 2d 279; 62 Pac. 2d 285 on rehearing; and the answer referred to 66 Pac. 2d 1048, which was a request to file additional and further authorities.

The case set up in the answer, 61 Pac. 2d 279, was in two causes of action when filed. The first cause was ejectment; and the second cause was to quiet title, but the second cause was dismissed by plaintiffs without prejudice before issue or trial. However the affidavit of counsel in support of summary judgment sets this up as grounds

for *res judicata* (R. 28). No certified copies of the pleadings, issues or judgment were placed before the court in the motion for summary judgment as required by (e) Rule 56, and the affidavit was a commingling of conclusions of fact and law by counsel, both of which are contradicted by all law and by the records of the litigations. In ejectment the judgment on ejectment is not *res judicata* on title (*Willis c. Willis,* — Wyo. —, 49 Pac. 2d 670); the decision of the supreme court is purely dicta, not essential or matters of *res judicata.* It denied the plaintiffs possession on the stated reason that the property was *custodia legis* in the receiver in 4561. He did have possession, but as an intruder, a trespasser, by his entry thereon March 3, 1933, after optionee Quinn, who was given possession under the option on Aug. 23, 1932, rejected the option and notified Tibbals to take possession of the property, and this was 5 months after the lease had expired, and 7 months after the receiver sold the unexpired term of the lease Sept. 1, 1932. The defendants herein admit their possession from Feb. 1, 1946, so that the *custodia legis* even as contended for by defendants had changed and neither was the grounds for denial of possession existent herein, nor consent to sue the receiver necessary. But aside from all this, the action of the court in 61 Pac. 2d 279 was totally and absolutely void, and without jurisdiction to relitigate even the matters of its dicta, or to destroy vested rights protected under the 14th Amendment to the U. S. Constitution, federal questions which the lower courts herein have refused to investigate or consider, or apply.

The statute of limitations set up has no application even under the record as defendants set it up. The record itself disclosed that Graham made his unlawful entry March 3, 1933, and the owners brought case 4871 set up by defendants herein on March 17, 1933, and denial of possession was continued by the court itself in its void judgment; and in 97 Pac. 2d 673, the record itself discloses this same court refused the owners permission to sue, and this continued as long as the receiver held the property, to-wit:

Feb. 1, 1946 and the owners were under a court created disability.

Sec. 3-502 Wyo. St. 1945 provides:

> "Recovery of real property. Limitations to run after disability removed. Any person entitled to bring an action for recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within 10 years after disability is removed."

See *Tibbals & Spriggs v. Graham*, 97 Pac. 2d 673.

The receiver never claimed title, either under color of title or otherwise. His plaintiff Marrin claimed a debt, which he has never even established, and the Wyoming lien statutes expressly exclude him from any lien against the owners or their property, and he has never established, or foreclosed any such lien. As a mere claimant of an unestablished debt, neither plaintiff Marrin nor his alleged receiver Graham, have any color of title, and have neither right of possession, or color of right of possession. He has no status in law, justice or right other than a willful trespasser, and in contravention of petitioners' rights secured by the 14th Amendment to the U. S. Constitution.

The answer alleges (Par. 7-R-7):

> "admit that said Mica Mountain Mines, Inc., is still in possession of said properties; and defendants allege that such possession is lawful under a VALID CONTRACT; with the receiver of said property, DULY APPOINTED BY A COURT OF COMPETENT JURISDICTION, and lawfully entitled to possess, and to sell, and grant possession of said premises and the whole thereof."

Again (Par. 11-R-9), it alleges:

> "that this contract was approved and confirmed by the Judge of the Seventh Judicial District in and for Fremont County, Wyoming, HAVING JURIS-

DICTION AND CONTROL OF THE RECEIVER, SAID RECEIVERSHIP, AND SAID PROPERTIES."

Again, referring to the assignment of the contract to respondents, it alleges (Par. 11-R-9):

> "that said assignment was consented to and approved by said Marshal Graham, receiver, and by the Honorable Judge of the District Court HAVING JURISDICTION OVER SAID RECEIVERSHIP PROCEEDINGS."

The answer sets up a copy of the contract (Ex. "A", R. 10-18) and the assignment as Ex. "B" (R. 19-21). Defendants must establish by evidence this defense. They did not and it is legally impossible.

Both parties claimed from a common source, the prior owners, John C. Spry estate and Federal Gold Mining Company, a Spry owned and controlled "paper corporation" (Affidavit, Par. 1-R 26).

To this answer, plaintiffs filed a Reply. It denied that the court ever did, or ever even attempted to appoint Graham receiver of the properties; set up that case 4561 on which defendants relied was a subsequent collateral case, and was totally without jurisdiction over the properties, to appoint Graham receiver of them or to authorize, consent to, approve or confirm the contract and assignment; that both contract and assignment were totally void, without jurisdiction, and constituted no defense to defendants.

The Reply set up the muniments of title of plaintiffs see Affidavit, pars, 2-3-4-5-R-26) derived from the common source through final, conclusive judgments of both the Fremont County District Court and the Supreme Court of Wyoming, with final sale, deed, and confirmation of sale to Tibbals, grantor of petitioners, being courts of competent jurisdiction, and with unquestioned jurisdiction of the subject matter, and parties and entire proceedings.

The Reply set up the pleadings and proceedings in case 4561 which disclosed to the court the total absence of jurisdiction in that case over the properties; and the total nullity and voidness of every act therein on which respondents herein rely. Set up that Tibbals was not a party and that no matter how judicially void those proceedings were, Tibbals and petitioners herein were relieved from taking notice thereof and were freed from litigating with respondents any rights claimed by them under case 4561; set up the refusal of the receiver to adopt the lease and the court's approval of his refusal to adopt; set up the sale by the receiver on Sept. 1, 1932 of all rights of the Midwest lessee to the properties as claimed under the lease or otherwise, and the court's confirmation of that sale; set up that the lease itself expired Oct. 10, 1932; set up the two interventions by Graham in case 4623, and his ratification of Tibbals-Quinn option, and his approval and confirmation of the order of the court approving the option, and his direction that any sale made in accordance with the option to Tibbals should be confirmed by the court in 4623 without further notice; set out the official files in 4623 showing that the question of *custody legis* had been specifically litigated in favor of Tibbals: and that the question of alleged fraud had also been specifically litigated in 4623 in favor of Tibbals; set up the total lack of jurisdiction of the court in 61 Pac. 2d 279 to relitigate those issues finally adjudicated in favor of Tibbals in 4623; set up that the court in attempting to relitigate these same issues in 50 Wyo. 277 was without jurisdiction and was motivated by bias and prejudice; that it declared a rule of property and of jurisdiction, a vested right in Tibbals, protected by the 14th Amendment to the U. S. Constitution and then arbitrarily denied Tibbals the protection of that vested right; set up the final adjudication in 4623, adjudging the receiver had no rights in these properties; set up the judicial files in 4561 which disclose that plaintiff Marrin had only claimed a debt against the Midwest lessee; that he had never established that debt, and had no lien and had never established or foreclosed a lien, and other matters

therein which constitute the complete alleged muniments of right as claimed by defendants, all of which disclosed no title, or claim of title, either legal or equitable, or right of possession, either in Plaintiff Marrin, or Graham, receiver or in defendants, respondents herein.

On motion of defendants, the reply was stricken on the grounds the rules did not provide for a reply, save to an answer with a counter-claim denominated as such. But the court had its attention called to the official files and matters.

MUNIMENTS OF PLAINTIFFS' TITLE

As briefly as it is possible to trace these muniments of title thru the long litigations and relitigations (R. 26 outlined by defendants) they are:

March 1, 1904, one John C. Spry and Barney Tibbals jointly owned and operated the properties herein involved. Some mining claims were in name of Spry, some in F.G.M.C. a Spry owned "paper corporation." (See 40 Wyo. 524.) (R. 50.) (See opinion below.)

By written agreement, duly executed and acknowledged and a matter of record in Fremont County, Wyo., Spry purchased the Tibbals interest for $17,500, and agreed to pay when he sold the properties. He died before sale. *Keys et al* were appointed his executors in Fremont County District Court. The trust agreement was regularly filed with the executors, who while admitting the agreement delayed payment until Tibbals sued. This agreement covered properties in both names.

March 17, 1928 Tibbals filed, and served case 4182, entitled *Tibbals v. Keys et al,* Executors of Spry estate, in Fremont District court, setting up the trust agreement, its regular presentation to the executors, and asked that it be established as a prior first trust or lien in the properties, and that they be sold and appropriated to satisfy the trust.

Oct. 17, 1929, the Wyo. supreme court, (40 Wyo. 524, 281 Pac. 190) established the first trust and ordered the properties sold FORTHWITH to satisfy the trust.

Oct. 10, 1928, while case 4182 was pending in the supreme court, said *Keys et al,* as executors of Spry estate, joining with heirs of Spry, and the trustees under the will of Spry, and F.G.M.C., the "Spry owned paper corporation" all constituting one single entity of ownership, gave the Midwest Mines Corporation a four-year lease, from Oct. 10, 1928 to Oct. 10, 1932 on the properties. This subsequent lessee, to protect its own interests under the lease, supplied attorneys with F.G.M.C. and Spry executors, and costs to litigate the appeal in 4182, and all subsequent litigations with Tibbals, which included 40 Wyo. 524; 42 Wyo. 214; case 1676 in supreme court, another appeal by F.G.M.C. from order denying intervention and judgment on mandate; and the ancillary case 4623, of the district court, which terminated with sale and deed and confirmation of sale to Tibbals. This made the Midwest lessee, in addition to being a privy, and actual party to all these proceedings, bound and precluded thereby. (*Souffront v. La Compagnie Des Sucreries,* 217 U. S. 475; 15 R. C. L. sec. 483, pg. 1009.)

When the mandate came down the F.G.M.C. filed a petition to intervene and asked injunction against execution, setting up the same absurd contention that F.G.M.C., which was the Spry owned, managed and controlled "paper corporation" had been in adverse possession, that is open hostility to Spry for 10 years. The Midwest lessee supplied attorneys and costs. The court denied intervention, and adjudged specifically that all claims in the contract and within the evidence in 4182, whether in the name of Spry or F.G.M.C. be sold Forthwith to satisfy the trust. The F.G.M.C. appealed back to the supreme court from the order denying intervention and judgment on the mandate. This was case 1676 in the supreme court, and this case the court afterwards dismissed.

On the same day after denying intervention, the district court, on application of F.G.M.C. issued an injunction against execution. The Midwest lessee furnished the bond, and attorney and costs. Tibbals went to the supreme court and filed *State Ex Rel Tibbals v. District Court,* 42 Wyo. 214, 292 Pac. 897, mandamus to compel vacation of the restraining order, demurrered to in above citation, and afterwards judgment to Tibbals on the pleadings. In the petition, the Midwest lease was set up as an exhibit, with the allegations of waste, depletion of judgment premises. Thus this lease was before the supreme court in this case. The court adjudged for Tibbals and dissolved the restraining order.

Before Tibbals could get execution and order of sale, the same F.G.M.C. brought ancillary case 4623 in the Fremont District Court against Tibbals, again setting up the same allegations of adverse possession, asked injunction against execution, and that its title be quieted. Injunction issued same day. The Midwest lessee supplied the restraining bond, and costs and attorneys. Being a privy, by these further acts, it became an actual party, bound and precluded thereby. (See citations, supra.) Later on the Midwest lessee was made an actual party and appeared by its own attorney, and filed a demurrer. On motion of plaintiff, the lessee was afterwards dismissed. It was bound and precluded by the judgment, first as privy, second as actual party by its conduct of active participation, and third, by being made an actual party.

RECEIVER ALSO A PARTY BY INTERVENTION

Nov. 3, 1930, or 2 yrs., 7 months, 17 days after filing and service of case 4182; one Marrin brought case 4561, entitled *Marrin v. Midwest Mines Corporation,* F.G.M.C. and Executors of Spry estate. The petition alleged the Midwest lessee was indebted to plaintiff for $901.25 for wages from July 1, 1929 to Oct. 1930 as stationary engineer, while Midwest lessee was mining and depleting the premises. He asked judgment for that amount and that it be declared a lien against the property of the Midwest lessee. The al-

legation against the owners was that they claimed an adverse interest in the premises. On an allegation of insolvency of the Midwest lessee, on same day, Nov. 3, 1930, Graham was appointed receiver of the Midwest lessee, before service, and without notice.

Tibbals was not made a party The petition set forth his prior trust with this allegation:

> "There is a judgment outstanding in an action brought by Barney N. Tibbals in which said Tibbals was found to have a first trust lien on said premises for the payment of $17,500. The execution of said judgment, however, has been temporarily stayed."

Tibbals was under his constitutional, statutory and legal rights freed from taking notice of this subsequent collateral suit, or from litigating with the subsequent Midwest lessee, or with Marrin, as its subsequent creditor, or with Graham receiver of the Midwest lessee. The court in case 4561 was totally without jurisdiction over the properties, that is the fee simple title involved in the Tibbals judgment. Nothing the court did in case 4561 had any force or effect as against Tibbals. The court was totally and absolutely without jurisdiction over the property, and without jurisdiction or power to hinder, delay, alter, modify, defeat or in any way whatsoever interfere with the PRIOR, EXCLUSIVE, CONTINUING JURISDICTION, CUSTODY AND CONTROL OF THE PROPERTIES or the process of the court in case 4182, and subsequent appellate and ancillary litigations 4623.

This prior, exclusive jurisdiction and custody of the properties and the Tibbals rights involved in case 4182,-4623, and appellate cases,—IS A RULE OF PROPERTY, AND OF JURISDICTION—a vested property right, and as such protected to Tibbals under the 14th amendment to the U. S. Constitution, and the universally established law of the State of Wyoming and of the United States, and makes up the body of the law under the constitution, statutes and substantive law of Wyoming, which this court,

and the court below was bound to recognize, follow and establish in determining the issues of this pending litigation, but which the lower courts herein both failed to do.

APPLICABLE BODY OF WYOMING LAW DENIED

Sec. 55-210 Wyo. St. 1945, specifically excludes any adverse rights against Tibbals. It provides:

> "In all suits under this act (the lien statutes) the parties to the controversy shall, and all other persons interested in the controversy and in the property charged with the lien MAY be made parties; but such as are NOT made parties shall NOT be bound by any such proceedings."

There was nothing for Tibbals to litigate in 4561. He was not a party. And his prior exclusive rights were placed before the court by plaintiff in his petition.

Sec. 3-907 Wyo. St. 1945, specifically protects Tibbals and excludes any adverse rights whatsoever. It provides:

> "When the summons is served, the action is pending, and while so pending, NO INTEREST CAN BE ACQUIRED BY THIRD PERSONS IN THE SUBJECT MATTER THEREOF AS AGAINST PLAINTIFFS' TITLE."

Tibbals filed and served case 4182 on March 17, 1928, to establish his first trust and have the properties sold and appropriated to his claim. The defendants in that case, and other Spry interests attempted to lease to Midwest lessee on Oct. 10, 1928, these properties for 4 years, to Oct. 10, 1932. The statute is plain, it was and is binding on the Wyoming courts, and on this court and the court below herein. No argument is necessary to show total lack of right by the subsequent Midwest lessee, to these properties, or by Marrin, or by the receiver.

Sec. 8, Art I, Wyo. constitution guaranties:

> "All courts shall be open, and every person for an injury done to person, reputation, or property,

shall have justice administered WITHOUT SALE, DENIAL OR DELAY."

Tibbals had a prior undisputed trust in these properties. He filed case 4182 on March 17, 1928; went THREE times to the supreme court; relitigated a FOURTH final judment; the proper courts of competent jurisdiction gave him a deed Oct. 15, 1932; he died in 1939 all the while asking the courts of Wyoming to give him his property; his widow, now old and gray, and petitioner have carried on continually, and is in this court today, asking the fruits of the final judgments of the highest court of Wyoming whose mandate was enforced in the order of sale, deed, and confirmation.

Sec. 6, Art I, Wyo. constitution guaranties:

> "No person shall be deprived of life, liberty, or property without due process of law."

Sec. 7, Art I, Wyo. constitution guaranties:

> "Absolute arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Sec. 33, Art I, Wyo. constitution guaranties:

> "Private property shall not be taken or damaged for public or private use without just compensation."

Sec. 34, Art I, Wyo. constitution guaranties:

> "All laws of a general nature shall have a uniform operation."

The decision of the court below makes all these constitutional guaranties inoperative to petitioners. They are denied the equal application of express Wyoming statutes, of Wyoming law. And for respondents benefit, special property rights are created by law of the court, jurisdiction to deny petitioners equal rights is created by the simple process of judicial assertion, that by asserting facts to be true which are untrue and proven so by undisputed court

records in the proceedings. And for respondents benefit express Wyoming statutes which are an exclusive procedure for the creation, establishment, and enforcement of liens are ignored and property rights decreed to respondents in open violation of those statutes, and in open conflict with the established procedure, and in open violation of the common dictates of natural justice. A double discriminative law to govern this case is created and applied. Statutory and constitutional rights are denied petitioners, their property taken without due process of law; and property rights are created and handed to respondents contrary to all law of Wyoming and of the United States, and contrary to the common principles of right and justice. And the court below has refused to examine and apply the muniments of right and claim of both parties and administer law and justice on such undisputed facts.

RULE OF PROPERTY RIGHT AND JURISDICTION

The supreme court, 61 Pac. 2d l. c 282 declares the rule of property and jurisdiction and then denies petioners its protection. To quote:

> "— the doctrine of custody legis is a rule of property right, as well as of jurisdiction, made for the purpose of avoiding conflicts between courts, and it applies until the matters have been fully disposed of whether the execution issue out of the same or another court."

Here is a vested property right and rule of jurisdiction protected by the 14th Amendment to the U. S. Constitution denied petitioners. The record is not disputed. Tibbals filed and served case 4182 March 17, 1928, to appropriate these specific properties to his prior first trust. From that date, these properties were in the PRIOR, EXCLUSIVE, and CONTINUING, jurisdiction, custody and control of the court in that case and this continued through the subsequent and appellate proceedings, 40 Wyo. 524; 42 Wyo. 214; case 1676, the appeal of the F.G.M.C. from judgment on mandate and denying intervention; and the

ancillary case, 4623, with final sale, deed, and confirmation of sale to Tibbals.

It excludes case 4561 from any semblance of jurisdiction over these properties. Any and all attempted exercise of jurisdiction in this case is totally and absolutely VOID, WITHOUT SEMBLANCE OF JURISDICTION. This includes the contract and assignment set up by respondents. The court in this subsequent collateral case was without jurisdiction to hinder, delay, defeat, obstruct or interfere with the process of the court in the prior Tibbals case 4182 and subsequent appellate and ancillary case 4623, and any attempt to do so is absolutely void, and constitutes no defense to defendants. The law is so universally established, and without a single contrary dissenting voice of any court, that only a few of the multitude of decisions need be cited. (Sec. 50, Wyo. 524 above quoted:*Wiswall v. Sampson,* 14 How 52, cited by Wyoming. The identical point of decision was that prior exclusive custody dates from filing the bill. The receiver therein was not appointed until 2 months after judgment, and he was receiver for the judgment debtor and not a subsequent lessee; *Kline v. Burk Construction Co.,* 260 U. S. 266; *Root v. Woolworth,* 150 U. S. 401; *Riverside Cotton Mills Co. v. Alabama & Georgia M. Co.,* 198 U. S. 189; *Fayweather v. Ritchie,* 195 U. S. 296; *Rickey Land & Cattle Co. v. Miller,* 152 U. S. 258; *Freeman v. Howe,* 7 How 612; *Buck v. Galbreath,* 70 U. S. 334; *Stillman v. Combe,* 198 U. S. 435; *Lang v. Chotaw,* 160 Fed. 359; *Brun v. Mann,* 80 C.C.A. 513; In states,—*State Ex Rel Sullivan v. Reynolds,* Judge 209 Mo. 161, 107 S.W. 487; *Ketchen v. District Court,* (Okla.) 198, Pac. 481; *Stanolind Oil Co. v. Busy,* 90 Pac. 2d 877; *Black Panther Oil Co. v. Swift,* 170 Pac. 238; *Operator's R.-P. Co. v. Tulsa,* 56 Pac. 2d 400; *Atlas Supply Co. v. Roberts,* 68 Pac. 2d 76; and the list could go on without number. Thus cases 4182, with appellate case and ancillary case 4623, were with full absolute exclusive jurisdiction, and are *res judicata* in favor of petitioners herein; and case 4561, was and is without the semblance of jurisdiction. The contract and assignment are an absolute nullity. And 50 Wyo. 277 was totally with-

out jurisdiction to relitigate. The law applies to different cases in the same court. *Gibbons v. Ellis,* (Colo.) 165 Pac. 783, quoting New York

RECEIVER APPEARS IN 4623—HIS RIGHTS DENIED

Tibbals filed a special appearance and plea to the jurisdiction of the court in 4623 challenging the jurisdiction of the court to enjoin execution of supreme court mandate Receiver Graham made application to the court in both case 4561, his receivership case, and 4623, the same judge sitting in both cases, and set up he had an interest in the properties and asked permission to intervene and resist the Tibbals special appearance and plea to jurisdiction. He was ordered to appear, and he did so, and was successful in his contention that the court in 4623 had jurisdiction. By this conduct he was estopped to assert the contrary as he did later in 50 Wyo. 277. (*See Poston v. Delfelder,* 39 Wyo. 163, 270 Pac. 1068.) By his urging, Tibbals was held as defendant in 4623 and compelled to re-litigate for the FOURTH time the same rights with same parties and privies.

Next the receiver made another application to the court in cases 4623, and 4561, saying he had an interest in the properties and was again directed to intervene in 4623 and set up his claims. He did so. He set up the same identical claims relied on by respondents herein that he was receiver of Midwest Mines Corporation, and represented its creditors. The record shows he appeared on order of the court, and not by being made a party by plaintiff. The plaintiff was permitted to add the Midwest Mines Corporation, and the Spry Executors as defendants, and afterwards dismissed as to them. But plaintiff could not dismiss as to the receiver brought in by order of the court and who filed an affirmative cross-bill.

On final trial evidence of the receiver's alleged claims were introduced, including his pleadings, accounts and alleged liens. The court adjudicated that he had no claims of any nature to the properties. For the express purpose

of excluding the receiver from any claims against the properties or even the surplus, the court, after making provision for carrying out the mandate of the supreme court and selling the property to satisfy the trust, interest and costs, specifically adjudged:

> "—and the remainder, if any there be, shall be paid to the clerk of this court for plaintiff—OR SUCH DISTRIBUTION BETWEEN THE PLAINTIFF AND THE ESTATE OF JOHN C. SPRY—as the court may afterwards determine in case of presentation of adverse claims."

The court provided for a possible contingency in distribution of any surplus to protect the Spry Executors who might feel required in final settlement to account for their portion of the claims in the Spry name as inventoried in the estate or their rights in the judgment in 4182. It definitely excluded the receiver. He did not appeal.

The supreme court, 61 Pac. 2d 280, quotes the above provision but omits the portion in capitals, and thereby gave it a false construction. Then the court adds:

> "We pause here to state that plaintiff keeps reiterating that by this judgment defendant's rights to the properties were determined and therefore the matter is *res judicata.* The record quoted "above shows that an order was made dismissing defendant. Not being a party his rights were in no way adjudicated. ONLY ADVERSARY PARTIES ARE ESTOPPED AND CONCLUDED BY A JUDGMENT UNDER THE DOCTRINE OF *RES JUDICATA.*"

The court had just said, 42 Wyo. 214, 292 Pac. 898:

> "A judgment operates only between the parties thereto, AND THEIR PRIVIES."

In 62 Pac. 2d 287, the court says:

> "The rights of the latter (receiver) could not,

it is true, be greater than that acquired under the lease."

The same court, 61 Pac. 2d 282, says:

> "It is also true that later in January, 1933, the district court entered its order confirming the sale of the mining property in case 4623. But the receiver was not a party to the proceeding, and therefore the ONLY PARTIES ESTOPPED OR CONCLUDED BY THE COURT'S JUDGMENT OF CONFIRMATION WERE THE ADVERSE PARTIES, F.G.M. C. AND BARNEY TIBBALS."

The judgment of confirmation is another final conclusive, *res judicata* judgment, with all the force as any other final judgment.

Voorhees v. Bank, 10 Peters 450; Gringnon's Lessees 43 U. S. 319; *Goodman v. Cretcher* (Kan.) 294 Pac. 868; *Mathews v. Neffy,* 13 Wyo. 457, 81 Pac. 304.

The Wyoming supreme court, in the case relied on by respondents, specifically adjudges that the sale in 4623 is conclusive as between the original parties, and thereby adjudges that Tibbals and Spriggs were the owners of the fee simple title. These respondents being total strangers in right or claim, are without right or standing to question the title of petitioners (*May v. Penton,* 45 Wyo. 82, 16 Pac. 2d 35). If the above portion of the judgment of the supreme court is judicial, in harmony with the constitutional guaranties, express Wyoming statutes and general law, it is proper that this valid portion be adopted and the other portions of the same judgment in open contravention to the universally established law of the entire land, and constitutional and statutory provisions should be disregarded as totally void, first because the court had no jurisdiction to relitigate in this subsequent collateral case, the same issues it had finally adjudicated in the prior direct case, 4623, acting with full and complete and exclusive prior jurisdiction.

PRIOR CUSTODY AND RULE OF PROPERTY AND JURISDISTION SPECIFICALLY ADJUDGED IN CASE 4623

Tibbals in his answer and cross-bill in 4623 specifically alleged:

> "Further defendant says that said property is in custody of law under the judgment secured by this defendant against the property in case 4182 in the District Court of Fremont County, Wyoming, entitled *Barney N. Tibbals, plaintiff v. Rollin W. Keys et al,* Executors of the estate of John C. Spry, deceased, a copy of which judgment is hereto attached marked Ex. "A," and the same is hereby made a part of this answer and cross-petition."

This issued was in final judgment, in this direct action, adjudged in favor of Tibbals and in harmony with all established law. In the subsequent collateral case, 61 Pac. 2d 279, the court was without the semblance of jurisdiction to relitigate this issue, and its attempt to do so was absolutely void.

The federal courts herein could not disregard valid final adjudications by this same court in 4623 wherein the court had full, complete, exclusive, prior jurisdiction, matters judicially *res judicata,* and accept as *res judicata,* the dicta of the same state courts in a subsequent collateral case acting without the semblance of jurisdiction to relitigate. It is in open contravention of the constitutional rights secured by the said 14th Amendment to the U. S. Constitution, and a denial of the equal protection of the law.

In its final judgment in case 4623, the record discloses the court specifically adjudged that F.G.M.C. had at all times been a party to case 4182 and subsequent appellate and ancillary litigations, and that it was bound and precluded by that prior litigations and judgments. The court made the judgment in case 4182 a part of its judgment in case 4623; adjudged that the Spry estate and F.G.M.C. were one single entity; dissolved the restraining

order; and issued a counter-restraining order enjoining any further annoyance of Tibbals by useless litigation, or attempts to interfere with his right to execution, or with the full enjoyment of the fruits of his judgment, or any title of the purchaser at the sale; adjudged that all title in the properties, as existing on March 1, 1904, date of the trust, and all acquired thereafer be sold to satisy the trust in conformity with the supreme court mandate. The court gave the owners until Oct. 15, 1932, to pay and satisfy the judgment and prevent sale; and decreed that if not so paid by that time, then all rights in the property were lost, save and except to any surplus, and adjudged that this surplus, if any, be distributed between the F.G.M. C. and Spry executors if the latter presented claims for any portion; and it expressly adjudged the receiver had no rights in the property and excluded the receiver from any claim to any surplus.

VALIDITY OF THE OPTION WAS SPECIFICALLY ADJUDGED IN 4623

The court in 4623 set the sale for Oct. 15, 1932, or five days after the lease would expire. The purpose was to avoid all possibility of either the Midwest lessee or the receiver ever making objections to the sale or raising any legal complications whatsoever. If the lessee or the receiver should wish to make objections, or start any legal action, they must do so before the lease expired. This left 5 days thereafter in which the owners, F.GM.C. and Spry Executors could pay and satisfy the trust, and prevent sale, and they themselves be free from all possibility of legal complications with either the lessee or the receiver.

The owners and the receiver working together had tried in vain to find a buyer, Tibbals had no deficiency judgment, but one strictly IN REM, an ORDER OF SALE, and he announced his intention to bid only the amount of his trust with costs of sale. The order of sale issued regularly, and the property was being advertised when the owners and the receiver found one Quinn, who agreed to

take an option to purchase if his test proved the mine to have sufficient workable value. He could not make his test before day of sale. The owners and Graham, alleged receiver, asked Tibbals to do them a favor, namely, to extend until Jan. 2, 1933, the time in which the optionee could make his test and take up a deed from Tibbals under an option. Tibbals finally agreed on condition that no legal complications should arise to affect in any way his title to be acquired at the sale; and secondly, to make sure this could not happen, that the agreement be reduced to writing, properly notarized, and be submitted to and be approved by the court itself. This was all done.

All parties who had or even claimed an interest in the properties, the owners, Spry Executors and F.G.M.C., were represented by their attorney; and the receiver Graham, represented by his attorney; and Tibbals represented by his attorney; and Quinn, optionee, represented by his attorneys, and it is truly said, all working together in perfect harmony and in the best of good faith, to accomplish a solution mutually beneficial to each and all — formulated, reduced to writing, signed and acknowledged before a Notary, each party save Tibbals signing and acknowledging by their respective attorneys, Tibbals signing in person, and when so executed, was taken by a disinterested attorney, Mr. Harnsberger, attorney for the receiver in 50 Wyo. 277, and now attorney for respondents, and he submitted it to the court, purely as a favor to the parties, he being county attorney and having county business before the court, and the court made his written order in the case, specifically approving the option and directing that the advertised sale should be in conformity to the option agreement. Promptly thereafter the owners, and Graham, signing as trustee, he having in the meantime on Sept. 1, 1932, conducted a receiver's sale in 4561 and sold the unexpired 6 weeks term of the lease, and all other property of the Midwest lessee, in full satisfaction of all debts of the lessee, together with optionee Quinn, executed a written ratification for filing in the case wherein they expressly approved and ratified the option agreement itself

and also the order of the court approving the option, and specifically directed the court that any sale made to Tibbals under the option be confirmed without further notice to them. This ratification alone made Graham a party to case 4623, had there been nothing else and thereby bound and precluded by the sale, deed, and confirmation of sale to Tibbals (*Blossom v. Milwaukee,* 1 Wall 635; *Goodman v. Cretcher* (Kan.) 294 Pac. 868).

This was a court of competent, exclusive, prior jurisdiction over the properties. It was further directed by the supreme court to make its own terms of sale. Its jurisdiction as to this matter was regularly, properly and legally invoked, and it exercised that jurisdiction. Graham had opportunity to object, to allege want of jurisdiction, and custody of law, and fraud, and instead he did the reverse, he ratified and asked the court to proceed as it did. If he had had an interest in the property he could appeal, object to confirmation of sale. This matter being regularly before the court, and finally and specifically adjudicated, the subsequent collateral court in 4871 did not have the semblance of jurisdiction to relitigate the same matter. First, that judge of equal rank was no wiser, no more competent, and it was beyond his jurisdiction to set himself up in a subsequent collateral case as possessing superior competency or judicial wisdom, or to accuse the prior judge of himself being a party to a fraud. The one controlling authority, every where cited and followed, showing total lack of jurisdiction to relitigate this finally adjudicated issue is *Throckmorton v. U. S.,* 98 U. S. 86. And to this may well be added *Atlas Realty Co. v. Roway,* 51 Wyo. 218, 65 Pac. 2d 1128; *Hennesy v. C. B. & Q. Ry.,* 24 Wyo. 305, 157 Pac. 698. And since there was no evidence of fraud, the court in the subsequent collateral case acted beyond and in excess of jurisdiction. *McGuiness v. Superior Court* (Cal.) 237 Pac. 42, citing Throckmorton.

NO SEMBLANCE OF FRAUD, EITHER EXTRINSIC OR INTRINSIC

The substance of the option agreement is briefly summarized. The owners and receiver had failed to find a

buyer. Tibbals announced he would bid only the amount of his claim. The owners and receiver were sure to get nothing. Under the option, if the mine stood the test, the optionee would take up the Tiballs deed with his title acquired at the sale. Further he would pay Tibbals an additional sum of $5000, which the parties stipulated as settlement due Tibbals under his claim of damages for malicious prosecution of these delaying injunction proceedings. In turn Tibbals would file a written release in both case 4182 and 4623 releasing the parties and their bondsmen from damages therefor. He did this. The bonds had been furnished by the Midwest lessee, and it had been a party to the injunction suits. The owners, Spry Executors and F.G.M.C. would in turn file a written Waiver of Right of Appeal in 4623 and make the judgment final, conclusive and absolute. They did this. Tibbals would execute a Quit Claim Deed to the properties and deposit it in escrow to be taken up by Jan. 2, 1933, under the option. He did this.

By a second option between optionee and Graham, if the mine stood the test, the optionee would pay Graham $34,500, which was the amount the creditors had paid at the receiver's sale for the unexpired term of the lease and other property of the lessee. The court had adjudged the receiver no claims to the properties in 4623. He was sure to receive nothing except thru the Tibbals option. This gave him a chance to receive this substantial sum instead of nothing.

By a third option between the owners and optionee, if the mine stood the test, the optionee would pay the owners some $60,000 and they stood a chance to realize this substantial sum instead of the nothing they were otherwise sure to get. This is why the owners, and receiver asked Tibbals for this favor, and why they asked the court to grant the favor, and this is why they filed a written ratification, specifically ratifying and confirming both the option itself and the order of the court approving the option.

A possible obstacle to the carrying out of these options arose when it was considered that some disinterested third

person might appear at the sale and bid $1 or like insignificant sum over the Tibbal judgment and take title to the properties at the sale. This would deprive both owners and the receiver from their chance to realize these substantial sums instead of nothing. The option met this obstacle by providing that if any third person did so appear, then Tibbals under direction of the other parties, would increase his bid as they directed him to do but that neither Tibbals nor the officer making the sale should be required to account for any such surplus. His title should be full, complete, and absolute, and subject only to the right of optionee to take up his deed prior to Jan. 2, 1933, and subject to no other claims whatsoever, and if not taken up, Tibbals should have possession with no other claims of any other party whatsoever.

Had the court refused to approve this option, his refusal would undoubtedly have been challenged as an abuse of discretion, for it was the court's duty to assist the owners and other parties to realize the best possible returns from their property, and this was their own plan and the only way they saw open to them. No third bidder appeared at the sale, but the receiver was represented by his own attorney who put in one bid to make the sale a success, on the theory that there should be two bids to render the sale legal, a theory perhaps without foundation. In this $34,500 was a court allowance of $5000 to the receiver, and another $5000 to the attorney for the receiver, plus all receiver expenses in case 4561 on the suit of Marrin to collect $901.25 which was a matter between them and the court in 4561, Tibbals not being a party to the case or the separate receiver-Quinn option. The record does disclose in case 4561, and also 62 Pac. 2d 286, that the receiver, he being also a creditor, banded together with the other creditors and bid in the property of the Midwest lessee in the name of the same Graham, calling himself trustee for all creditors, but the court in 62 Pac. 2d 286 could find no cause to voice objection to this collective bid and purchase or label it fraud.

The mine failed the test. Tibbals twice extended the

option time, first to Feb. 2 and then to March 3, 1933, to enable further testing. These further tests were a failure, and on March 3, 1933, the optionee rejected the option, notified all parties of his rejection, and directed Tibbals to take possession of the property, which possession optionee had held since Aug. 23, 1932.

Before Tibbals could get over the mountains to the mines, Graham went in March 3, 1933, and took possession under a claim of receivership. Tibbals & Spriggs, the latter having acquired a part interest from Tibbals, filed March 17, 1933, case 4871, which is 50 Wyo., 277, 61 Pac. 2d 279, for possession against Graham, as receiver, and Graham and Kempf, his watchman, as individuals. On trial the court found for plaintiffs, gave them possession, and assessed a penalty of $500 against Graham as receiver. Afterwards the court granted a new trial to Graham, as receiver, but left the judgment standing as to Graham and Kempf as individuals and it so stands today. This judgment against Graham as individual binds him in his individual and also in his capacity as trustee, and all capacities save receiver. (*Emerson-Brantingham Imp. Co. v. Riverton Elevation Co.,* 43 Wyo. 67, 297 Pac. 393.

While in possession Tibbals & Spriggs brought case 5059 in the Fremont District court and received final judgment quieting title against Marrin, plaintiff in 4561, in which final judgment the court adjudged that he be forever debarred from claiming or asserting any claims whatsoever in and to the properties, being the same properties involved herein, and the same properties sold to Tibbals in case 4623. This is another final and conclusive judgment in favor of petitioners and against respondents, and is also *res judicata* against plaintiff Marrin, and against receiver Graham, appointed for the benefit of Marrin, and against respondents claiming thru Marrin, and Graham. The U. S. District Court (R. 38) refusing to examine the evidence sets up this judgment as *res judicata* against Tibbals &

Spriggs; and it also cites case 4870, a case that was never even at issue or tried.

The statute of limitations had no application, and no notice of it was given by the court below. Plaintiffs Tibbals and Spriggs brought their action 4871 for possession 14 days after the trespass and entry by Graham, and have been denied possession ever since by the court itself. Case 97 Pac. 2d 673 disclose the supreme court decreed that they could not sue without permission of the alleged receivership court, one totally without jurisdiction, and he refused such permission.

Sec. 3, 502 Wyo. St. 45 provides:

> "Recovery of real property. Limitations to run after disability removed. Any person entitled to bring an action for recovery of real property, who may be under a legal disability when the cause of action accrues may bring the action within 10 years after the disability is removed."

MOTION AND AFFIDAVIT FOR SUMMARY JUDGMENT DISCLOSES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW

As grounds for summary judgment cases 61 Pac. 2d 279 and 62 Pac. 2d 285, the opinion of the supreme court. To quote from 62 Pac. 2d 286:

> "The rights of the receiver arose out of a lease made to the Midwest Mines Corporation by F.G.M.C. in 1928, SUBSEQUENT TO THE TIME THE TIBBALS RIGHTS ACCRUED.
>
> "The Midwest Mines Corporation became insolvent in 1930, and a receiver was appointed for it in November of that year SO THAT THE CREDITORS OF THE LESSEE MIGHT BE PROTECTED. The receiver was appointed LONG BEFORE THE PLAINTIFFS HEREIN SOUGHT TO ENFORCE THE RIGHTS WHICH TIBBALS HAD."

Tiball's vested property rights, the rule of custody, of property and of jurisdiction accrued March 17, 1928 with filing of case 4182.

Quote further:

> "On Sept. 1, 1932, the receiver sold the mining property of which he had possession and this sale was confirmed by the court. The property was bid in by the receiver himself. He as purchaser is called a trustee. He bid in the property in his official capacity and to quote from the order of confirmation 'for the benefit of all parties holding claims, liens, charges and expenses of administration of whatsoever nature in the receivership proceedings.'
>
> "The rights of the latter (receiver) could not it is true be greater than that acquired under the lease."

The court itself says the rights of the receiver were in the lease. The lease is sold, that is, the unexpired 6 weeks term, along with all other property of the lessee, IN FULL SATISFACTION OF ALL DEBTS, INCLUDING PLAINTIFF MARRIN'S ALLEGED UNESTABLISHED DEBT, AND ALL COSTS. This lease expired Oct. 10, 1932, five days before the Tibbals sale in 4623.

The court below herein, with this declared statement of the rights of the receiver, has approved a totally void judgment of the state court, the effect of which as applied against petitioners is that the Midwest lessee, or the receiver taking his lease, in full satisfaction of all debts of the lessee, can stay in possession of the leased premises, now past 16 years after the lease expired, pay no rent, deplete the premises, and then claim the fee simple title of the owners, and sell it again at receiver's private sale, without notice or hearing to the owners, for some purpose or other not legally possible.

Again, quote, 62 Pac. 2d 286:

> "Further, counsel contends that the judg-

ment in that case, (4623) presumably particularly that part which directed a sale of the property was binding on the receiver, even tho he was not a party to the suit when the judgment was rendered upon the theory that he was a privy of the lessor; that his rights are based merely upon a lease given to the Midwest Mines Corporation; that being merely a lessee, he is bound by any judment against the lessor. THAT WOULD PERHAPS BE TRUE IF THE LEASE HOLDER INTEREST HAD BEEN ACQUIRED DURING THE PENDENCY OF THE ACTION—BUT IT WAS ACQUIRED PRIOR THERETO."

Here the supreme court states the body of the law of Wyoming, and that is what the court herein must follow. The record is undisputed. Tibbals filed and served case 4182 March 17, 1928. The Rule of Property and of Jurisdiction, declared by the same court, page 282, a vested property right protected to petitioners herein under the 14th Amendment to the U. S. constitution, accrued on that date. The lease was Oct. 10, 1928, subsequent thereto. Sec. 3, 907 Wyo. St. expressly excludes the lessee from any adverse rights. In addition the established law of *lis pendens* of Wyoming and the entire land excludes the subsequent lessee from any adverse rights. Case 4623 was not a new case, but an ancillary case restraining execution in 4182. (*Stillman v. Combe,* 197 U. S. 823; *U. S. v. Johnson,* 73 U. S. 166; *Riverside Cotton Mills v. Ala. & Ga. Mnfg. Co.,* 198 U. S. 188; *Root v. Woolworth,* 150 U. S. 401). The Wyoming court 61 and 62 Pac. 2d supra states a rule of law and denies plaintiffs the protection thereof by an arbitrary misstatement of sequence of time. The date of filing 61 Pac. 2d 279, and the date of filing case 4623 are not the date of fixed rights, but only a suit to determine rights fixed at a prior date, and the date to be considered as fixing Tibbals rights was March 17, 1928.

The records of 4561 disclose an order of the court therein requiring Graham, receiver to give an additional

bond before making disposition of any property in his alleged receivership, and his failure to comply therewith. This renders the contract and assignment absolutely void and without jurisdiction. Further, Marrin died July, 1943, and there is no revivor. At the date of assignment of the contract to respondents there was not even a plaintiff substituted for deceased Marrin, and the alleged approval of the assignment was totally void and without jurisdiction. Defendants alleged, and must prove 4561 and the alleged receivership, contract and assignment by a court with prior exclusive jurisdiction of the property, superior to the court in 4182—appellate proceedings, and ancillary case 4623. That burden is on defendants to prove, and before petitioners need offer evidence to disprove. Nothing in 4561 binds Tibbals or petitioners. The court in the above statements takes no notice of the true dates of accrued rights of Tibbals, or true date of claimed rights in the receiver and his lessee. It takes no notice of the undisputed record that the receiver refused to adopt the lease and the court confirmed his action, an act which eliminated the lease from his alleged receivership, even if he had a valid receivership. (*Quincy v. Humphrey,* 145 U. S. 82; *Union Nat. Bk. v. Bank of K. C.,* 136 U. S. 223). And the court took no notice of the expiration of the lease on Oct. 10, 1932, and the bounden duty of the purchaser to surrender possession on expiration of the term.

PRE-TRIAL CONFERENCE

At pre-trial conference, defendants moved for judgment on the pleadings (R. 23). By counter-motion plaintiffs moved to exclude all evidence of claim of right in defendants because every issue had been adjudicated by the Wyoming District and Supreme court in favor of plaintiffs, and against defendants in case 4182, 4623 and appellate proceedings (R. 22). These motions were set for hearing (R. 23). In the meantime defendants filed motion for summary judgment (R. 24) based on the pleadings, and supported by affidavit of counsel (R. 24). No copies, certified

or otherwise of the judgments or judicial proceedings accompanied their motion as required by (e) Rule 56. The affidavit itself is a commingling of conclusions of fact, and conclusions of law, both of which are disproven by the records and universally established law of Wyoming and of the land. Plaintiffs served notice that they would produce the official files and records of the cases involved, and they did this (R. 33) but the court refused to examine them or consider them. Plaintiffs asked the court to make finding of fact and conclusions of law, tracing the muniments of right and title of both parties from the common source, and conclusions as to their legal force and effect under the issue. The court refused to do so (R. 38) and the refusal has handicapped and embarrassed plaintiffs, and perhaps made them an object of criticism by being compelled to extend this petition trying to get the truth and facts before this court in their outline of the claims of both parties. The district court with no evidence before it, and considering only the reported opinion of the Wyoming court in 61 Pac. 2d 279 and 62 Pac. 2d 285, granted summary judgment to defendants (R. 41) (opinion R. 35-41)) and the U. S. Court of Appeals, Tenth Circuit affirmed the judgment (R. 54, opinion 49-53). The day in court to support the issues of plaintiff, and the demanded jury trial (R. 21) were denied plaintiffs, a right guaranteed plaintiffs under the Seventh Amendment to the U. S. Constitution, and Rule 38-39 of the Federal Rules. (*Ranson v. Staso Milling Co.*, 2 FRD. 128; *Fraser v. Geist*, 1 FRD. 267; *Sibbach v. Wilson & Co.*, 312 U.S. 442.) Ohlinger's Fed. Practice page 2, Vol. 3 A.

COURT OF APPEALS HAS TAKEN FROM PETITIONERS VESTED PROPERTY RIGHTS AND DENIED THEM THE EQUAL PROTECTION OF THE LAW

> "Whenever a state takes private property of one person and gives it to another BY ITS JUDICIAL DEPARTMENT, such act IS NOT THE DUE PROCESS OF LAW GUARANTEED BY THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES."

Fayweather v. Ritchie, 195 U. S. 300.

The muniments of title of petitioners are full, complete, absolute and acquired under final conclusive judgments and judicial proceedings of the Fremont County District and the Supreme Court of Wyoming, courts of competent and unquestioned jurisdiction, acting in strict conformity to constitutional, statutory, regular and established procedure. Vested property rights acquired under these final conclusive judgments, the judgments themselves being vested rights, for which valuable considerations were taken and appropriated by the court therein to satisfy a prior trust in the properties and Tibbals and petitioners are denied the equal protection of final conclusion judgments, all of which is contrary to the express constitutional guaranties of the Wyoming constitution, and the express written statutes of Wyoming, and the substantive law of Wyoming, and of the United States, and in direct contravention to the 14th Amendment to the Constitution of the United States.

THE WYOMING COURTS HAVE CREATED AN ESTATE, OR ATTEMPTED SO TO DO, IN A RECEIVER, CONTRARY TO THE CONSTITUTION, STATUTES AND LAWS OF WYOMING. THIS WAS WITHOUT JURISDICTION AND TOTALLY VOID.

COURT OF APPEALS BELOW HAS ADOPTED ASSUMED FACTS WHICH DID NOT EXIST. The court of appeals has refused to hear evidence, and apply that evidence of muniments of right and title of plaintiffs, and of defendants. On the contrary, relying solely on printed opinions of the Wyoming Supreme Court in 61 and 62 Pac. 2d supra, it has adopted totally void dicta, founded in assumed facts that did not exist either in fact in the official proceedings of case 4561, the source of information; and on conclusions of fact and law which could not be true, and were not true. And had any such adjudications in case 4561 been made, as assumed by the Court of Appeals, herein, such adjudications would be and were totally void and without jurisdiction and could constitute no defense to defendants herein, or be a legal basis for the

opinion of the court below. And it further would be in open violation of the body of the law of Wyoming constituting the law of Wyoming under the Rules and Decisions Act of Congress. In its decision (R. 50) the court of appeals states:

> "Midwest Mines Corporation acquired a lease on the mining claims, took possession thereof, AND EXPENDED SUBSTANTIAL SUMS OF MONEY THEREON. — NUMEROUS PERSONS BECAME ENTITLED TO LIENS UPON THE MINING CLAIMS FOR LABOR AND MATERIALS."

The court of appeals acts first on the assumption that a valid lease, as against Tibbals, was given on the properties, and that the lessee had valid rights against Tibbals which the Wyoming court in 4561 could administer. All this is erroneously assumed, and the same was not and could not be true in law.

Next, the court just assumes that numerous persons became entitled to liens. This is not true, it cannot be true. The Wyoming lien statutes expressly exclude such items of labor and materials to creditors of the lessee from liens. Under statute, and under the law of Wyoming construing those statutes by the supreme court, all such creditors are limited and restricted to the property of the lessee. And further under the exclusive and under the PRIOR EXCLUSIVE JURISDICTION CUSTODY AND CONTROL OF THE PROPERTIES, which is a rule of property and of jurisdiction, the court in 4561 was without the semblance of jurisdiction over the properties to establish a lien or interfere with the process of the court in the prior case 4182—and 4623.

The court in 4561 was without jurisdiction to establish or create a lien; and it did not do so; and the case in the collateral case, 61 Pac. 2d 279; and 62 Pac. 2d 285, was without the semblance of jurisdiction to establish or create a lien. If any lien were to be established it MUST be done

in 4561, and it was not. It could not be done in the collateral ejectment case. An examination of the decisions in the above collateral cases reveals that the court therein did not adjudicate or attempt to adjudicate a lien. An examination of 61 Pac. 2d 279, reveals that there is an outline of the answer of the receiver, stating that some $70,000 was expended by the lessee, but the records of the trial reveal that the court therein would not permit evidence of that allegation. It was of no concern to the court or the receiver. In case 4561 there was no such allegation or issue. The only issue there was the pleading of Marrin that he had a debt of $901.25 against the Midwest, and his claim of a lien against ITS property. Then the only basis of fact on which the court of appeals below acted was the outline of the pleadings in 61 Pac. 2d 279, that the pleader alleged these statements. And the best there was in case 4561 was the pleader's allegation that the Midwest lessee owed Marrin a debt, and the debt was not even established. And the court below took no notice of the subsequent proceedings in case 4561, such as the refusal of the receiver to adopt the lease; and his sale of the lease and other property of the lessee in full satisfaction of all debts, including the plaintiff Marrin's claim; and then the expiration of the lease itself; and the further depletion of the premises by these defendants themselves, taking out $50,599.54 (R. 24). It is legally impossible for the lessee, or the receiver, or these defendants to have any estate, claim or right whatsoever in and to these properties.

COURT BELOW ASSUMES A VALID RECEIVER APPOINTED AND EVER SINCE IN LAWFUL POSSESSION

The court below, (R. 50) further states:

> "In a case pending in the district court of Fremont County, Wyoming, entitled *J. J. Marrin v. Midwest Mines Corporation*, numbered 4561, on Nov. 3, 1930, Marshal Graham was appointed receiver of the Midwest Mines, and as such receiver went into possession of the mining claims and certain mining machinery and fixtures thereon AND HAS AT ALL

TIMES BEEN SUCH RECEIVER AND IN POSSESSION OF SUCH MINING CLAIMS AND PROPERTY."

This statement was not and could not be legally true. The records of case 4561 would disclose that this could not be true. There was a total lack of jurisdiction for that court to appoint a receiver of the properties, that is the fee simple title at issue herein. And the court did not do that. Had it attempted, such act is absolutely void. But the record discloses that all the court attempted to do was appoint Graham receiver for this subsequent lessee. That is what 62 Pac. 2d 286 relied on by defendants and the court below says. And the same court states the receiver sold that lease in full satisfaction of all debts and receivership charges, including Marrin's debt. Then no further creditors, or alleged liens, or debts, or expenses whatsoever could exist.

The original RES of the alleged receivership was a lease. This is personal property (*Nix v. Brogan,* 251 Pac. 755; *Beren v. Marshal Oil Co.,* 251 Pac. 192). This court, *Wiswall v. Sampson,* 14 How 42, quoted by the Wyoming court defines the RES as the FUND IN COURT, which is the property of the insolvent which the court takes possession of, in a suit against the owner of that property, and sells it to pay the debts of the insolvent. And the supreme court of Wyoming declares that Receiver Graham took the Midwest lease and sold it in full satisfaction of all debts of the lessee. He was never receiver of the owners nor their property. And after all debts of the Midwest lessee were paid, the effect of the decision of the court below, made without inspection of the evidence and record in 4561, is to the effect that the receiver could and did stay in possession of the owner's property, now some 16 years after the lease expired, and then that receiver had authority in law to hold a second receiver's sale and sell at private contract, the owners property to these defendants who themselves have depleted the property by over $50,599.54.

WYOMING HAS NO SUCH RECEIVER STATUTE

The Wyoming statute under which Graham is alleged to have been appointed receiver is sec. 3-7301, and there is no authority for a receiver, *pendente lite,* to wind up the affairs of an insolvent corporation; all he is authorized is to hold the property, here a lease, and other personal property, until the court determines by its final judgment, that plaintiff Marrin has a debt and establishes the amount; and if his debt is a lien, which under the Wyoming lien statutes excludes the Marrin debt from any property save that of the lessee, the court establishes a lien; then that lien is foreclosed under the exclusive method of the statute, by execution sale at public auction with right of redemption. Sec. 3-7302 specifically excludes Graham from being eligible as a receiver, he being one of the largest creditors, and he was appointed without notice, and before service. But neither Tibbals nor petitioners need take notice of the appointment of the receiver, or any act of the court therein, because case 4561 was totally without jurisdiction over the fee simple title.

The court of appeals has assumed validity of all the dicta of the Wyoming court in this subsequent collateral case, assumed its jurisdiction, assumed liens, and appointment of a valid receiver, and by so doing has taken the property of petitioners from them, and created in these defendants an estate, consisting of valuable property rights.

The court of appeals states from the dicta of the Wyoming court that Graham was not a party to case 4623. It takes no notice of the Wyoming and universally established law that this makes no difference on the property rights involved. The receiver as mere custodian had no title or right of possession (*Union Nat. Bk. v. Kansas City Bk.,* 136 U. S. 223.) He had only the right of the Midwest lessee (*Philadelphia 4th St. Bk. v. Yardley,* 165 U. S. 634) and it had none. It was excluded from any rights by statute (Sec. 3-907) and by Wyoming law.

> "We understand that since the inception of this litigation some of the parties affected have trans-

ferred their interests or a portion of them at least, to other persons. Such transferees would UNDER THE WELL KNOW PRINCIPLES OF LAW of course be bound by what had already been done in the action and were as well obligated to take notice of further steps in the case, under the same rules, as would govern the original litigants."

Hasket v. Linch (Wyo.) 103 Pac. 2d 164.

First Nat. Bk. v. Cook, 12 Wyo. 492, 78 Pac. 1083.

The receiver was not an interested party, and he had no defense and could make none. *Vener v. Denver Union Water Works Co.* (Colo.) 90 Pac. 263.

But the records show he was a party. He twice intervened, urged jurisdiction, then set up his claims and was adjudged no rights. The records control.

The court of appeals took no notice of lack of jurisdiction in the receiver, who was a mere custodian of leasehold rights, to represent general creditors, or to litigate such rights in the collateral case, 61 Pac. 2d 279; or of the lack of jurisdiction in the court to attack a final judgment after term in any way save the exclusive method provided by Wyoming statutes (*Parrot v. District Court*, 20 Wyo. 494, 126 Pac. 45) or to attempt to set aside a judgment without making the original parties defendant. (*Field v. Holland*, 6 Cranch 8; *Coiron v. Mailaudon*, 19 How 113.)

The court of appeals took no notice of the refusal of the receiver to adopt the lease (*Quincy v. Humphrey*, 145 U. S. 82, and his duty to surrender the property back to the owners on termination of the lease, he having no better rights (*White v. Ewing*, 159 U. S. 223).

The court of appeals took no notice that the question of prior custody and jurisdiction in case 4182—and subsequent appellate litigation, terminating with case 4623, in sale and deed and confirmation was a vested property right in Tibbals and these petitioners, and that case 4561 was without jurisdiction over the same properties.

The court of appeals took no notice of the record, and law, disclosing that the question of prior custody, and the alleged fraud, had been finally and conclusively litigated in favor of Tibbals in case 4623, and that the subsequent collateral case 61 Pac. 2d 279 was without jurisdiction to relitigate these same issues, and that any attempt to do so was void.

The court of appeals took no notice of the facts, law and constitutional guaranties secured to Tibbals and petitioners in the Wyoming constitution, and the 14th Amendment to the U. S. Constitution which inhibits a denial of equal protection of the law, and equal protection to the fruits of final judgments of the Wyoming courts in favor of Tibbals and petitioners; and which renders void any judgment of the Wyoming courts, as relied on by defendants, which takes away such constitutional rights by a judgment which is collateral and in open violation of express Wyoming statutes, constitutional guarantees and substantive law, and contrary to the common dictates of natural justice law and right.

> "The prohibition of the 14th Amendment is addressed to the States. It is these which Congress is empowered to enforce against state action, HOWEVER put forth, whether the action be EXECUTIVE, LEGISLATIVE, OR JUDICIAL.
>
> Whoever by virtue of public position under a state government deprives another of property, life, or liberty—without due process of law—OR DENIES OR TAKES AWAY THE EQUAL PROTECTION OF THE LAW, violates the constitutional inhibition.
>
> And as he acts in the name of the state, and for the state, and is clothed with the power of the state —his act is that of the state.
>
> THIS MUST BE SO OR THE CONSTITUTIONAL PROHIBITION HAS NO MEANING."

Ex Parte Virginia, 100 U. S. 399.

See Chicago B. & Q. Ry. v. Chicago, 166 U. S. 1 c. 984.

The court of appeals did not recognize the universal law that the prior exclusive jurisdiction in cases 4182 and 4623, to render judgment and make an order of sale carries with it the jurisdiction to make such sale and execute the judgment, else there is no such thing as a court of competent jurisdiction. The court also would place petitioners in the position of having a lien, when the Tibbals lien merged in the judgment, and the judgment merged in the sale, and if a back track were made to the judgment, the order of sale—IN REM, must be enforced against the property. It is contrary to established law and procedure to say a judgment against the owners, standing as a prior first trust, is dependent upon or is to be enforced thru a subsequent court, at the suit of a creditor of a subsequent lessee, when that court has no jurisdiction, and the creditor no legal claim to the property whatsoever.

McCormick-Chadbourn, cases, quoting Chief Justice Tanney, p. 38.

QUESTIONS PRESENTED

1. Are petitioners denied the equal protection of the law and is their property being taken without due process of law, contrary to the 14th Amendment to the Constitution of the United States? This is the real question and covers the whole ground. Other questions presented are the steps thru which such denial and taking was accomplished.

2. Did granting summary judgment to defendants deny plaintiffs their right to a day in court and jury trial contrary to the Seventh Amendment to the Constitution of the United States and Rules 38-39 of Federal Rules, and contrary to the established law of both Wyoming and the United States?

3. Are petitioners further denied the equal protection

of the law and is their property taken without due process of law contrary to either section 6, or 7, or 8, or 33, or 34 of the Wyoming constitution? And contrary to express Wyoming statutes, including sec. 3-709; and Art. 2-3-4 Ch. 55 Wyo. lien statutes; and other statutes and substantive law of Wyoming?

4. Was the Fremont County Wyoming District Court, in cases 4182—ancillary case 4623, and case 5059; and the supreme court in 40 Wyo. 524; 42 Wyo. 214; case 1676 of the supreme court, all litigating the Tibbals rights, courts of competent jurisdiction, with prior exclusive, continuing jurisdiction, custody and control of the properties therein involved? And did that jurisdiction attach March 17, 1928, the date of filing and service in case 4182, and did it continue to judgment, sale, deed and confirmation of sale Oct. 15, 1932 in ancillary case 4623? And since every issue and right herein involved was finally adjudged in favor of Tibbals therein, are not petitioners entitled to the equal protections in law of those final judgments, and are they not *res judicata* in favor of petitioners and against defendants herein?

5. On the contrary, was the court in the subsequent collateral case 4561, a suit by a creditor of the Midwest subsequent lessee, a court of competent, or superior jurisdiction over these same properties already in litigation in cases mentioned in question 4?

6. Was the subsequent collateral court in case 61 Pac. 2d 279 and 62 Pac. 2d 285 a court of competent jurisdiction to relitigate the same issues, and property rights already finally litigated in cases mentioned in question 4? And could that court create in plaintiff Marrin in case 4561, or in Graham, his receiver, an estate or property rights by judicial declaration, contrary to express Wyoming statutes, and contrary to the law of Wyoming and contrary to the dictates of natural justice?

7. Does the body of the law of Wyoming under the Rules and Decisions Act, 28 Fed. Code sec. 725 consist of

the constitution, statutes and general substantive law of the state as it actually exists and as applied to all other citizens and litigants under like and similar circumstances, as contended for by petitioners? And if so were not the federal courts herein required to ascertain and apply such law to this case?

8. Does the body of the law of Wyoming under said Rules and Decisions Act consist of the void, isolated, biased, inconsistent decision of the supreme court in cases 61 and 62 Pac. 2d supra, as contended for by defendants? And could that law be ascertained by the federal court below, without injury as to the issues actually adjudicated, and without inquiry as to its jurisdiction to relitigate matters already finally litigated in cases mentioned in question 4; and without inquiry as to contravention of that decision to the express Wyoming statutes, and general law of the state; and without inquiry into the truth or untruth of the obvious self-created facts and jurisdiction of the court on which it based its dicta decision?

9. Were the federal courts herein below duty bound to exercise their own independent judgment thru inquiry into the truth and actual facts, validity and force of the judicial records constituting the muniments of right, title and claim of both parties and adjudge in accordance with truth, right, law and justice?

Petitioners assert that the answers to questions 1-2-3-4-7-9 must be -Yes. And that the answers to 5-6-8 must be -No.

REASONS WHY THE WRIT SHOULD ISSUE

Federal questions are presented which can be determined only by this court. The constitutionality created jurisdiction and duty of this court to protect petitioners in their constitutional rights secured by the Seventh Amendment and by the 14th Amendment to the Constitution of the United States is placed before this court and it is a question fundamentally of national importance. The official court records constituting the muniments of title and claim of

both parties, when taken in evidence, are not open to dispute. They and their truth are the basis for equal justice herein. They reveal an open and flagrant violation of petitioners' right to such equality of law. If the right to this writ rests in the discretion of this court in acting, then discretion should be guided by duty to adjudge equality, with truth as the evidence, and right, law, and equal justice as the goal.

Further this court is met with the duty to require that justice in the federal courts herein below be based only on truth when clearly ascertainable. They decline to receive in evidence the court records containing the truth. And the judgment of the courts below was based on a judgment of the state court, without inquiry by the federal court of the issues adjudicated within its jurisdiction, and to the lack of jurisdiction in the state court to adjudge, and the total voidness of its judgment on which the federal courts below based their own judgments. It was the duty of the federal courts below to reject a state court decision, rendered without jurisdiction, and by its own records revealed to be in open contravention to the constitution, express statutes and substantive law of Wyoming, and based on facts and jurisdiction created by the court itself by judicial assertion, when the officials court records set forth by that court itself reveal the untruth of both the facts created and the jurisdiction it exercised. Justice in federal courts below and in this court must be founded in truth under said 14th Amendment.

The court of appeals is based on assumed facts which were not true, and assumed legality of proceedings in 4561, and dicta decision of the supreme court in 61 and 62 Pac. 2d, supra, neither one of said assumptions being true. And the federal courts below refused evidence to prove the falsity of the facts and voidness of the judicial proceedings. Such judgment is invalid and a denial of due process of law.

The judgment of the court of appeals concedes a valid conclusive judgment establishing the prior Tibbals trust, and a valid order of sale to satisfy that judgment in cases

4182 and appellate supreme court decisions thereon, and ancillary case 4623, with prior, exclusive, continuing jurisdiction of the properties, and custody and control thereof, a rule of jurisdiction and property, a vested protected right under the said 14th Amendment. The court then assumes that the court therein lost jurisdiction to make the sale and deed to Tibbals under its prior exclusive jurisdiction, and that this was taken away by the court in the subsequent collateral case, 4561, a suit by a subsequent creditor of the subsequent Midwest lessee, a proposition of law which cannot be true, and is in open contravention to the universally established law of the United States under the harmonious decisions of this court and federal courts, and all state supreme courts adjudicating the question. This is a denial of equal protection of the law, is contrary to established and regular procedure, and is a taking of property without due process. Jurisdiction to render a judgment in a court of competent jurisdiction, and jurisdiction to enforce that judgment and satisfy the same, is an essential part of jurisdiction, without which there could be no jurisdiction to litigate in the first instance.

The court of appeals has accordingly recognized a valid established right thru such judgment and order of sale, and has attempted to void the remedy by which that right was enforced. And it would leave petitioners without a remedy.

JURISDICTION

The jurisdiction of this court is invoked under Section 237 b of the Judicial Code ((28 U. S. C. sec. 344(b).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution—Amendment XIV, Sec. 1

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VII—

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of Common Law."

Federal Rule 38—

"The right of trial by jury as declared by the Seventh Amendment to the constitution, or as given by a statute of the United States shall be preserved to the parties inviolate."

Federal Rule 39—

"(a) When trial by jury has been demanded as provided in Rule 38 the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by oral stipulation made in open court and entered in the record, consent to trial by the court, sitting without a jury; or (b) the court upon motion, or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Federal Rule 56—

"(e)—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served

therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Wherefore petitioners pray that the writ of certiorari issue under the seal of this court for its review and determination of the judgment and decree of the United States Court of Appeals, Tenth Circuit, in case numbered 3719 therein and entitled *Anna M. Tibbals and John J. Spriggs, Appellants v. Mica Mountain Mines Inc.*, a corporation, and Wallace M. Clinger, John L. Munson, and Pauline C. Egli, as Trustees of said corporation, and as individuals, Appellees, and that said judgment and decree of said U. S. Court of Appeals may be reversed by this Honorable court, and that petitioners have such other and further relief in the premises as this Court may deep proper.

Dated this the 1st day of April, 1949.

Respectfully submitted,

ANNA M. TIBBALS AND JOHN J. SPRIGGS,
Petitioners

JOHN J. SPRIGGS,

Attorney for Petitioners.

Lander, Wyoming.

APPENDIX

Art. XIV—U. S. Constitution—

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws."

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"(e) Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. SWORN OR CERTIFIED COPIES OF ALL PAPERS OR PARTS THEREOF REFERRED TO IN THE AFFIDAVIT SHALL BE ATTACHED THERTO OR SERVED THEREWITH. The court may permit affidavits to be supplemented or opposed by deposition or by further affidavits."

Wyo. St., 1945—Sec. 3-907—

"When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; AND WHILE SO PENDING NO INTEREST CAN BE ACQUIRED BY THIRD PERSONS IN THE SUBJECT MATTER THEREOF AS AGAINST PLAINTIFF'S TITLE."

Wyo. St., 1945—Sec. 3-502—

"Recovery of real property—Limitations to run after disability removed—Any person entitled to bring an action for recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within 10 years after the disability is removed."

Wyo. St., 1945—Sec. 55-210—of Lien Statutes:

"In all suits under this act, the parties to the controversy shall, and all other persons interested in the matter in controversy, and in the property charged with the lien—MAY BE MADE PARTIES; BUT SUCH AS ARE NOT MADE PARTIES SHALL NOT BE BOUND BY ANY SUCH PROCEEDINGS."

Wyo. St., 1945—Sec. 3-7302—

"Who is ineligible as receiver—No party, at-

torney or person interested in an action shall be appointed receiver therein except by consent of the parties, nor shall any party, attorney or person interested in an action be a representative of the receiver therein except by consent of the parties."

Rule of property and of jurisdiction, 62 Pac. 2d 1 c 282:

"—the doctrine of '*in custody legis*' is a rule of property right, made for the benefit of litigants, as well as of jurisdiction, made for the purpose of avoiding conflicts between courts, and it applies until the matters involved have been fully disposed of, whether the execution issue out of the same or another court."

Grounds to set aside a judicial sale—61 Pac. 2d 1 c 281:

"There are but two grounds on which a judicial sale can be held invalid; (1) Lack of jurisdiction in the court ordering it; (2) Or fraud practiced in effecting it."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

ANNA M. TIBBALS AND JOHN J. SPRIGGS, *Petitioners,*

VS.

MICA MOUNTAIN MINES, INC., A CORPORATION, AND WALLACE M. CLINGER, JOHN L. MUNSON, AND PAULINE C. EGLI, AS TRUSTEES OF SAID CORPORATION AND AS INDIVIDUALS, *Respondents.*

No. .....

PETITIONERS BRIEF IN SUPPORT OF PETITION

The opinion of the United States Court of Appeals, Tenth Circuit (R. 49-53) is reported in 172 Fed. 2d. 449.

JURISDICTION

The jurisdiction of this court is invoked under Section 237 b of the Judicial Code as amended by the Act of Feb. 13, 1925 (28 U. S. C. 344) "Where any-right-is specially set up claimed . . . under the Constitution."

The date of the judgment and decree was Feb. 2, 1949.

STATEMENT OF CASE

The case was stated in the petition herein, pages 1-37 and the statement therein is adopted for this brief. Evidence of the truth of the muniments of title and claim of plaintiffs, and the law applicable thereto was excluded

when offered (R. 33—Judgment R. 38) and plaintiffs below requested the court to make findings of fact and conclusions of law tracing the muniments of both parties from the common source, but the court refused this request, and there was no possible way to inform this court of the records other than to outline what those records disclose. Some of the facts outlined appear in this record in the affidavit in support of summary judgment (R. 25-32) and some appear in the dicta decision in 61 Pac. 2d 279; 61 Pac. 2d 285, but the untruth of the facts created by judicial assertion as the basis for the court's decision do not appear, and the federal courts below assumed facts which do not exist, and based their opinion thereon, with the result that petitioners are denied the equal protection of the law and their property taken without due process of law on assumed facts that are untrue, when the truth was offered and was available to the court below. Valuable and vested property rights are wrongfully taken from petitioners, and is handed over to defendants by and thru the absolutely void decisions of the Wyoming supreme court which illegally created an estate in an alleged receiver Graham by judicial declaration without the semblance of right in said Graham thereto and contrary to the Wyoming constitution, its express statutes and substantive law and contrary to the common dictates of justice, right and law.

QUESTIONS PRESENTED

The questions presented are stated in the petition, page 37, and are adopted herein.

SPECIFICATIONS OF ERROR

It is submitted the court below erred:

1. In affirming the judgment of the U. S. District Court below (R. 41) granting summary judgment, and,

(a) In refusing the offered evidence offered, and in not requiring evidence to support the issues made in the pleadings;

(b) In not evaluating the muniments of title and claim of both parties traced from the common source in accordance with their validity, force and effect under the law of Wyoming and of the United States;

(c) In denying plaintiffs a day in court and right to the demanded jury trial;

(d) In denying plaintiffs the equal protection of the law and taking their property in violation of law, contrary to the 14th Amendment to the U. S. Constitution and the constitution and laws of Wyoming;

(e) In taking from plaintiffs their property and vested propery rights, and handing it over to and creating in defendants an estate of such propery by judicial declaration, and without any legal claim thereto in defendants;

(f) By assuming facts not in existence, and adopting facts and jurisdiction created by the court in 61 Pac. 2d 279 and 62 Pac. 2d 285 by judicial assertion, contrary to the truth of the facts or jurisdiction and holding the same to be *res judicata* against petitioners.

2. In not holding that the final judgments, including the sale, deed and confirmation of sale to Tibbals of the properties, in case 4182, and appellate cases thereon, 40 Wyo. 524, 42 Wyo. 214 and case 1676 of the supreme court, and ancillary case 4623, and case 5059 to be *res judicata* in favor of petitioners and against defendants.

3. In holding that case 4561 was a court of competent jurisdiction, over the properties, with jurisdiction to appoint Graham receiver of the properties herein involved, and in holding that the court ever did appoint Graham receiver of the properties, and that as receiver he had continued in possession of such properties thereafter, and that he or the court had jurisdiction to make, consent to or approve the said contract and assignment set up in the answer of defendants, or that the same constitutes any defense to defendants.

4. In holding that the RES of said alleged receiver-

ship in 4561 consisted of anything but the subsequent Midwest lease. And in not holding that the refusal of the receiver to adopt the lease eliminated that RES from the receivership. And in not holding that such RES was eliminated by the sale thereof Sept. 1, 1932; And in not holding that it was completely eliminated with date of expiration of the lease Oct. 10, 1932.

5. In holding that the properties were in *custodia legis* in case 4561 on Oct. 15, 1932, the date of the Tibbals sale in 4623, or at any other time. And in not holding that the court in case 4182-4623 had exclusive, prior continuing jurisdiction, custody and control of the properties at all time from March 17, 1928, the date of filing and service of case 4182.

6. In holding that the properties were in custody *legis* in case 4561, at date of filing, service and trial in case 4871 or at time of the decision in 61 Pac. 2d 279 and 62 Pac. 2d 285. And in holding the decision of said supreme court to be *res judicata* in favor of defendants and against petitioners.

7. In holding that the body of the law of Wyoming under the Rules and Decisions Act consisted of the dicta decision of the Wyoming Supreme Court in 61 and 62 Pac. 2d, supra; and doing so without evidence of the issue adjudicated, and without inquiry as to the voidness of the court's action therein.

8. In not holding that the body of the law of Wyoming under said Decisions Act consisted of the constitution, statutes, and substantive law of Wyoming as it exists and is applied to all other citizens and litigants in Wyoming under like and similar circumstances, all of which supports the issues on behalf of petitioners, and excludes any right or claim in defendants.

9. In not using its own independent judgment and deciding the federal questions involved, and the law of the United States applicable hereto and evaluating the muniments of title of plaintiffs, and claim of defendant in accordance therewith and in conformity to the law of Wyom-

ing and of the United States, and established procedure, and the principles of right, justice and law.

10. In holding that the court in 4871- or 61 Pac. 2d 279, or 62 Pac. 2d 285 had jurisdiction to relitigate the question of *custodia legis* of the properties; or that the judicial sale to Tibbals in case 4623 was void, when both of said questions had been specifically litigated prior thereto in case 4623, in the court with exclusive and prior jurisdiction to litigate said questions, and had adjudged both in favor of Tibbals. And in adopting the decision in the subsequent collateral case as *res judicata* on those issues in favor of defendants.

11. In holding that the receiver in case 4561, represented any valid claim of right to the properties herein at issue at any time; and in not holding that such receiver was a stranger in right or claim thereto in case 4871, and on appeal thereon, supra, and as such stranger was without legal status to question the title of plaintiffs therein and in not holding that defendants herein were likewise strangers in title or right to the properties here involved, and as such strangers are without legal status to question or litigate with petitioners their title herein.

Reasons why the writ should issue are stated on page 39 of the petition and are adopted herein.

ARGUMENT

POINT 1

PETITIONERS ARE DENIED THE EQUAL PROTECTION OF THE LAW AND THEIR PROPERTY IS TAKEN WITHOUT DUE PROCESS OF LAW, CONTRARY TO BOTH THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF WYOMING, AND THE BODY OF THE LAW OF BOTH WYOMING AND THE UNITED STATES.

Since March 1, 1904, Tibbals had an undisputed prior first trust in the properties. And on March 17, 1928 he filed and served case 4182 in Fremont County, Wyoming to appropriate these properties to his first trust. This was the only court of Wyoming with jurisdiction. All procedure was regular and according to the established procedure and law of Wyoming. In October 1929, the supreme court of

Wyoming, in 40 Wyo. 524 finally established that first trust, and ordered the properties sold FORTHWITH to satisfy that trust. When a litigant secures final judgment in the highest court of the state, that settled all questions, once and for all. But Tibbals had to make two more trips back to the supreme court, to re-litigate the same rights and issues. 42 Wyo. 214, and case 1676 of the supreme court. That put on Tibbals an extra burden of litigating three times in the supreme court. Then ancillary case 4623 enjoined him with the burden of litigating for the FOURTH time with the same subject matter and parties, and privies, the same issues. The Midwest lessee supplied restraining bonds, attorneys and costs, and in addition to being a privy, was made an actual party to case 4623, and appeared therein, and was a party by conduct of participation.

The rule of property and of jurisdiction, a vested property right under the 14th Amendment to the U. S. Constitution, and the universally established law of the entire land, as applied to the pending case is briefly as follows:

From the time Tibbals filed and served case 4182 in the proper court of competent jurisdiction to appropriate these properties to his first and undisputed trust and to have the properties sold to satisfy that trust, the properties were taken into the prior, exclusive, continuing jurisdiction, custody and control of the court therein, which court had exclusive jurisdiction to decide EVERY QUESTION affecting the properties, and this included the alleged right of the subsequent Midwest lessee, and Marrin an alleged creditor of the Midwest lessee, and Graham, alleged receiver of the Midwest lessee; and this exclusive jurisdiction, custody and control of the properties continued on through the appellate cases, 40 Wyo. 524; 42 Wyo. 214; case 1676 of the supreme court, and ancillary case 4623, to final judgment, until the purposes of the suit were accomplished, which included the final judgment, sale, deed and confirmation of sale of the properties to Tibbals; and in aid of jurisdiction, it continues on to protect the title of the purchaser at the sale, Tibbals, and petitioners his grantees. And during all

this time, no subsequent, collateral, concurrent court has jurisdiction, power or authority to hinder, delay, obstruct, modify, defeat, or in any way interfere with the properties, or their prior exclusive continuing custody, jurisdiction and control by the court in the prior case, or obstruct the process of the prior court in its prior full exclusive jurisdiction over the properties. And any attempt by any subsequent, collateral concurrent court is absolutely void, a total nullity, without jurisdiction and constitutes no defense to any one acting under its proceedings.

The reason for and underlying this rule of property and of jurisdiction is stated by the supreme court of the United States, the federal courts, and different state supreme courts substantially as follows:

IT IS NECESSARY,

TO ACCOMPLISH THE VERY PURPOSE FOR WHICH COURTS ARE CREATED;

NECESSARY TO ORDERLY PROCEDURE;

NECESSARY TO END LITIGATION AND PROTECT LITIGANTS

NECESSARY FOR THE GOOD OF SOCIETY

NECESSARY TO PROTECT TITLES

NECESSARY TO PRESERVE CONFIDENCE IN COURTS

NECESSARY TO GIVE VIRILITY TO COURT JUDGMENTS, and like sound judicial reasons.

Applied to this pending case, it means that the court in cases 4182-and supreme court appellate case and ancillary case 4623 had the prior exclusive jurisdiction and custody of these properties at all times from March 17, 1928, and this continued to sale and deed to Tibbals October 15, 1932, and to judgment of confirmation, January 20, 1933, and in aid of jurisdiction to protect the title of purchaser

Tibbals and petitioners as his grantee, and that these cases are *res judicata* of every issue in the pending case involved.

POINT 2

COURT IN CASE 4561 HAD NO SEMBLANCE OF JURISDICTION

And it means that the subsequent, collateral concurrent court in case 4561 was absolutely without jurisdiction over the properties. And that if it did, or attempted to take custody, or jurisdiction in any way over the properties, the acts were absolutely void, a nullity, and that the alleged contract of alleged receiver Graham, to Towers, and assignment to defendants herein are absolutely void, without jurisdiction and a nullity and constitute no defense to defendants herein. Nothing more need be said. This writ should issue. This is the law of Wyoming, declared 61 Pac. 2d 282, see quotation page 13 of petition. It is the universally established law of the entire land. See page 14 of petition for writ for authorities from this court, the federal courts, and state supreme courts. And if it had ever been an open question in Wyoming, Tibbals had a right to have it judicially determined in case 4623, so he specifically alleged this custody (See page 18 of petition for allegation) and the court therein on final judgment did specifically adjudge this allegation in favor of Tibbals.

The defense set up in the answer that 4561 was a court of competent jurisdiction to appoint the receiver to take the fee simple title of the owners, and that the receiver acted under direction of a court in making the contract and assignment to defendants, had the court taken evidence, absolutely fails and defendants herein have no defense or justification whatsoever.

POINT 3

SUBSEQUENT COURT IN CASE 4871—61 PAC. 2D 279; 62 PAC. 2D 285—WAS WITHOUT JURISDICTION TO RELITIGATE ANY MATTER PREVIOUSLY LITIGATED IN CASE 4623. ANY ATTEMPT IS ABSOLUTELY VOID.

Case 4871, 61 and 62 Pac. 2d supra, was one brought in aid of and to enforce the jurisdiction and title through

case 4623. 61 Pac. 2d 281 states that a judicial sale can be set aside ONLY on two grounds, lack of jurisdiction in the court ordering it; or fraud in effecting it. Then as a premises, and as a basis for an attack on the sale to Tibbals in 4623, the court proceeds to create these two premises by judicial assertion, and on creating its jurisdiction by such judicial assertion, it proceeds to attack the sale in 4623. Neither one of the created premises was true or could be true in fact or law. Because; At time of sale, October 15, 1932, the properties were in the prior exclusive jurisdiction, custody and control of the court under case 4182-and appellate decisions thereon, and in ancillary case 4623.

First as a rule of property and of jurisdiction, a vested property right, protected by all law and the 14th Amendment to the Constitution of the United States, and the constitutional, statutory and substantive law of Wyoming;

Second, because that fact had further been specifically and finally adjudicated in the prior DIRECT action in 4623 by the ONLY court of competent jurisdiction;

Third, the created premise of fraud was likewise finally and conclusively adjudicated in case 4623, by the ONLY court of competent jurisdiction.

Fourth, there was not even the slightest semblance of fraud by Tibbals, either EXTRINSIC or INTRINSIC. The owners and receiver asked Tibbals to do them a favor. He consented only on condition it be reduced to writing, be submitted to and approved by the court; and further that nothing therein should in any way interfere with or prejudice his rights under his sale. The court did so approve. That adjudicated the question of fraud; and it confirmed sale, and this again adjudicated the matter.

Fifth; This same Graham afterwards ratified the agreement, and the order of the court approving the agreement.

It is impossible in fact to commit a fraud on a person by consenting to do him a favor. Or to act as his agent, under his direction, and do what he asks and directs to be done.

It is impossible to commit a fraud on a court when the matter is reduced to writing, notarized, and submitted to him in the legal course of judicial proceedings and he makes a written order in the case approving the matter. Nothing was concealed.

It is impossible to commit a fraud on the court or the person requesting the court action, when the person asking the favor and expecting a substantial benefit comes back and files a written ratification approving both the agreement and order of the court approving the agreement.

It is impossible to commit a fraud on a party who is a total stranger in right or claim to property involved in litigation and who has nothing to lose or be affected by such proceedings.

The only evidence of fraud recognized by law as grounds to attack a judicial sale is EXTRINSIC fraud, which is something that was not before the court, or could not with reasonable diligence have been placed before the court. It is some act of the prevailing party (Tibbals) that prevented the other LEGALLY INTERESTED PARTY, from having a hearing or presenting his arguments. For this court, and as the established law, this court has settled that, *Throckmorton v. U. S.*, 98, U. S. 86. And if there is no admissible evidence, or if the facts offered do not show EXTRINSIC fraud there is no jurisdiction.

> "A court has inherent power to vacate a judgment obtained by EXTRINSIC fraud. But if fraud is not proved, it must be held to have EXCEEDED its jurisdiction in vacating the order or judgment. It has jurisdiction TO INQUIRE INTO the existence of extrinsic fraud. But on failure of any proof of such EXTRINSIC FRAUD, any action taken which could be supported by the existence of such fraud WAS IN EXCESS OF JURISDICTION."
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> *McGuiness v. Superior Court* 237 Pac. 42 (Cal.) citing Throckmorton.

See also *U. S. v. Bisbee* 180 U. S. 343; *Toliver v. First Nat. Bank* (Okla) 64 Pac. 2d 1128;

Atlas Realty Co. v. Roway, 51 Wyo. 318, 65 Pac. 2d 1128.

And if this were not the law, there never could be an end to litigation; *Gray v. McKnight* (Okla.) 183 Pac. 492.

While Tibbals & Spriggs, plaintiffs, brought suit 61 and 62 Pac. 2d supra in aid of jurisdiction of 4182-4623 and appellate cases, the jurisdiction of the court in the later case was restricted. It had no jurisdiction to relitigate. It had jurisdiction to inquire if the properties were taken in the prior exclusive continuing jurisdiction custody and control of the court in 4182, and if the final judgments in 4182 and 4623 with sale, deed and confirmation of sale had been made; and if the prior status, including the issue of prior custody, had been litigated; and if the court in 4623 had considered the option, and made the order approving the option, and finding these undisputed facts to be true, it could not relitigate. The order of confirmation was of itself a final conclusive judgment. If this were not the law some justice of the peace would set aside U. S. Supreme Court judgments, so says this court. *Voorhees v. Bank,* 10 Peters 450; *Gringon's Lessees* 43 U. S. 319; *Goodman v. Gretcher* (Kan.) 294 Pac. 868; *Matthews v. Neffy,* 13 Wyo. 459, 81 Pac. 304. And if the court attempts to relitigate Prohibition should issue to protect the prior litigant; *Shortle v. McClosky* (N. M.) 46 Pac. 2d 52; *Oldfield v. Superior Court.* 20 Pac. 2d 671; *Seals v. Barnes,* (Okla.) 27 Pac. 2d 489; *Howard v. Duncan,* 21 Pac. 2nd 489, and these could go on without number but they show a denial of established and universal law.

POINT 4

61 AND 62 PAC. 2D, SUPRA, WERE ABSOLUTELY VOID BECAUSE THE COURT OPENLY DISREGARDED AND CONTRAVENED STATUTES OF WYOMING AND ESTABLISHED LAW OF THE STATE AND LAND.

The federal court below took no notice of the further

voidness of the dicta decision in 61 and 62 Pac. 2d supra, as being in open contravention of express Wyoming statutes and established law. It recognized and created an estate in the alleged receiver, the Midwest lessee, plaintiff Marrin in 4561, and these defendants which did not exist. The court below saw only the fact that the Wyoming supreme court had rendered a decision. The controlling question is: Did it have jurisdiction to render the particular judgment it did, in open violation of Wyoming statutes and established law? In a divorce case, the court has jurisdiction of the subject matter and the parties,—in that sense full and complete jurisdiction. But if on trial, the evidence establishes that defendant assaulted his wife, and the court renders judgment convicting him of criminal assault in a divorce trial, the judgment is totally void. On the contrary, if in a criminal trial, it is established that defendant assaulted his wife, and is charged with criminal assault, and on judgment the court grants a divorce to the assaulted wife, the judgment is totally void. While the court had full jurisdiction of the subject matter and party, it had no jurisdiction to render the particular judgment. And this is the law for 61 and 62 Pac. 2d supra.

> "Conceding the court had jurisdiction, the question is: Did it have jurisdiction TO RENDER THE PARTICULAR JUDGMENT IT DID ENTER? The mere fact that a court had jurisdiction of the subject matter before it does not justify the exercise of power not authorized by law, or grant relief to one of the parties not entitled to it. Every final decree granting relief the law declares SHALL NOT be granted is VOID."
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> *Ritchie v. Sayers,* 100 Fed. 520.
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> "A void judgment IS DEAD TIMBER ON THE JUDICIAL TREE, TO BE LOPPED OFF. Proceedings outside the authority of the court, OR IN CONTRAVENTION OF STATUTORY PROVISIONS, are WHETHER THE COURT HAD JUR-

ISDICTION OR NOT OF THE PARTIES AND SUBJECT MATTER, UTTERLY VOID." *Michel v. Williams* (Cal.) 56 Pac. 2d 546.

"Such a judgment is A COMPLETE NULLITY —AND IS NOT PROTECTION TO ANYONE ACTING UNDER IT." *France v. Freeze* (Wash.) 102 Pac. 2d 546; *Abelliers v. District Court,* (Cal.) 102 Pac. 2d 331; 109 Pac. 2d 947; Rowe's Estate, (Cal.) 142 Pac. 2d 770.

"All proceedings under it are void" *Ex Parte Nielson,* 131 U. S. 182; *Reynolds v. Stockton,* 140 U. S. 254.

"A matter once tried the court IS WITHOUT JURISDICTION to relitigate" *Reedy v. Superior Court,* (Cal.) 29 Pac. 2d 780, citing *Hine v. Morse,* 218 U. S. 493. And affirmance by the supreme court adds nothing, for it cannot breathe life into a corpse.

Latimer v. Vanderlice, (Okla.) 62 Pac. 2d 1197; *Whitaker v. Dillingham,* 152 Pac. 2d 371.

The supreme court in 61 and 62 Pac. 2d supra adjudged in open contravention to express Wyoming statutes. It recognized and created by judicial declaration adverse and superior rights in Midwest lessee, against Tibbals in total violation of sec. 3-907—See page 11 petition herein; and in open contravention of the express Wyoming lien statutes Art. 2-3-4 Ch. 55, Wyo. St., which expressly excluded plaintiff Marrin in 4561 from any claim against any property save the lease; in 62 Pac. 2d 1 c 286, the court states;

"Counsel however contends that the judgment in that case, presumably particularly that part which directed a sale of the property was binding upon the receiver even though he was not a party to the suit when the judgment was rendered, upon the theory that he is a privy of the lessor, that his rights are based merely upon a lease given to Midwest Mines Corporation, and that being merely a lessee, he is

bound by any judgment against the lessor. THAT WOULD PERHAPS BE TRUE "IF THE LEASEHOLD INTEREST HAD BEEN ACQUIRED DURING THE PENDENCY OF THE ACTION BUT IT WAS ACQUIRED LONG PRIOR THERETO."

The court quotes the statutory law of Wyo. Sec. 3-907, and the established law of Wyoming, and of the entire land, which is that a litigant is freed from taking notice of and litigating a subsequent privy. See *Hasket v. Linch,* (Wyo.) 103 Pac. 2d 164, quoted page 23 of application; *First Nat. Bank v. Cook,* 12 Wyo. 492, 78 Pac. 1083; *Tilton v. Cofield,* 93 U. S. 163.

The record is undisputed. Tibbals filed and served case 4182 March 17, 1928. And the lease executed by the defendants in case 4182, joining with the Spry heirs, and trustees under his will, and Federal Gold Mining Company, the Spry owned "paper corporation" was executed Oct. 10, 1928 while case 4182 was pending on appeal in the supreme court.

Case 4623 was not a new case but an ancillary case, an injunction restraining execution in 4182. See authorities page 18 of petition. The court in 62 Pac. 2d 286 was without jurisdiction to take away vested property rights from plaintiffs therein by a judicial declaration that October 10, 1928 is prior to March 17, 1928. The decision is absolutely void as in contravention to this statute. The Wyoming constitution requires equal operation of all laws, and inhibits arbitrary power. See sections 6-7-8-33-34, Art. I set up in pages 11-12 of the petition.

POINT 5

61 AND 62 PAC. 2D, SUPRA, IS ABSOLUTELY VOID AS IN CONTRAVENTION TO WYOMING LIEN STATUTES.

The Wyoming lien statutes, Art. 2-3-4-Ch. 55 provide the exclusive method for the creation, establishment and foreclosure of liens. The court has no jurisdiction to create a lien. There can be no lien unless the statute makes the item a lien. And the Wyoming statutes specifically exclude

plaintiff Marrin in 4561 and his debt from a lien. His was depleting labor, mining and depleting the properties, and working for a lessee. Such a creditor has no lien against the property of the owner, he must confine his suit to the lessee. *National Supply Co. v. Weaver,* 35 Wyo. 224, 248 Pac. 353. And had the legislature made his depleting labor a lien, wherein the owner received no enhancement in value to his property, the same would in Wyoming, be a taking of property without due process of law, contrary to Sec. 6, Art. I of Wyoming Constitution. *Geo. Bollin v. North Platte Irrig. Co.,* 19 Wyo. 542, 121 Pac. 22. These statutes specifically provide that one claiming a lien must then get a money judgment fixing his debt; then the court must adjudge that the debt is a lien item; then they provide for foreclosure of the lien by public sale, with right of redemption. There is no such thing as possession save and except to the purchasers at the foreclosure sale, and this after the period of redemption has expired. And all of this is subject to any and all prior liens and vested rights. The court in 61 and 62 Pac. 2d above absolutely disregards all these statutes. And it has gone to the unpredented extent of declaring that plaintiff Marrin need never establish his debt as alleged in his petition, or establish a lien as required by law, but that on his simple act of filing suit claiming a debt against the Midwest lessee, when under the statutes and supreme court decisions of the state, he is excluded from a lien against the owners, he can have Graham appointed receiver of the Midwest lessee to hold the property of the lessee until he secured judgment establishing his $901.25 and then turn it over to either the lessee or Marrin, whichever one the court finally adjudges is entitled thereto. But the said supreme court, and the federal court below take no notice at all of the official judicial records of the case which disclose that plaintiff Marrin never did as much as establish his debt, and never did and never could have a lien against the owner's property; that the express statutes and law excluded that possibility; and further disregarded the official record, which disclosed that the receiver refused to adopt the lease, and the court approved such refusal,

thereby taking even the lease out of his alleged receivership —*Quincy v. Humphrey,* 145 U. S. 82—; and the court disregards the fact that the receiver sold the unexpired term of the lease on September 1, 1932 and the court confirmed that sale, as stated by the court itself—62 Pac. 2d 286—in full satisfaction of all debts whatsoever of the lessee, including plaintiff Marrin's debt, and receivership charges—there satisfying the suit of plaintiff Marrin, and further satisfying all debts whatsoever. And the court disregards the undisputed record that the lease itself expired October 10, 1932. And the court disregards the record of the final judgment in 5059 wherein Tibbals and Spriggs quieted their title and the court forever debarred and excluded Marrin from asserting any claims to these properties. And the court further disregarded the fact that these defendants have depleted the properties further to the extent of $50,-559.54 in a few months and are still depleting it. And the said supreme court, and the federal courts below disregard the constitutional guaranties of the Wyoming constitution, set up pages 11-12 of petition—and particularly sec. 8—Justice shall be administered without sale, denial or DELAY.

The supreme court in said case makes these statements: 1. The rights of the receiver could not be above the lease and lessee's rights. That means there were not any adverse rights at all. 2. That the court sold all the rights of the lessee, and that Graham bought it in as trustee for all creditors, and in full satisfaction of all debts and charges.

The court advanced an argument and stated that he bought it in in his capacity as receiver. That was not the record of the court in 4561. It directed the receiver to make conveyance to and deliver possession to the purchasers, which was done. And then Graham, acting without application to the court, but as any purchaser would do, immediately optioned his purchase away. But what difference would it make? The record would control and it shows that he sold the lease which had 6 weeks left of its unexpired term. Question: If the purchaser bought the unexpired term of the lease what did he get? Answer: He got the un-

expired term of the lease. Question: What was the duty of the lessee and purchaser of the lease? Pay rent to the end of the term and then deliver possession back to the lessor or his successor in title.

The Wyoming supreme court in said decision declared as the law for plaintiffs therein, and the federal court below had adopted that and enforced it against petitioners, the astounding law, that a purchaser of the 6 weeks unexpired term of the lease can hold possession, now 16 years after the lease expired, pay no rent, and then hold a second ALLEGED receiver's sale, and sell at private sale, by contract and assignment set up by defendants herein, not the RES of the receivership, but the fee simple title of the lessor and owners. And all this in the face of the statutes and law of Wyoming which exclude the lessee, and the plaintiff Marrin, and receiver from any claim whatsoever against the property of the lessor or owners. And in the face of the official record of case 4561 which shows that the receiver sold, at receiver's sale, in 4561, on September 1, 1932, the lease and all other property of the lessee for $34,500 in full satisfaction of plaintiff Marrin's debt and all other debts and receivership charges whatsoever.

The said supreme court, and the federal court below have thus taken from petitioners their property without due process of law, and have created in the alleged receiver, and defendants, by judicial declaration a valuable estate consisting of the vested property rights of petitioners.

POINT 6

COURT DENIED PETITIONERS THEIR DAY IN COURT AND JURY TRIAL

By granting summary judgment the court below denied petitioners their day in court, and demanded jury trial, contrary to the Seventh Amendment to the constitution of the United States, and Rules 38-39 of Federal Rule, and the established law and procedure of Wyoming and the United States. (See page 42 of petition herein) for Amendment, Rules and authorities.

Genuine issues of fact were involved. The action was one at law. Evidence of the official files was necessary to show what issues were involved in the different cases and what the court adjudged as necessary to the adjudication, and whether the court was acting with or without jurisdiction, and its judgment void or valid. The answer alleged that the said supreme court adjudged that Graham WAS THEN ENTITLED TO POSSESSION. That was 1936 and right of possession may change overnight, and adjudication of right of possession is not a necessary fact to an adjudication of title. (See page 3 of petition herein, citing *Willis v. Willis,* (Wyo.) 49 Pac. 2d 670), and the law applicable thereto could not be applied without the facts. Defendants alleged case 4561 was a court of competent jurisdiction over the properties, and that Graham was appointed receiver of the property, by a court of competent jurisdiction and that he had the legal right to make and consent to assignment of the contract to defendants. Defendants were required to prove that, and they must establish their own valid muniments of right and claim. They were relieved from this impossibility. The supreme court itself, in the decision relied on, specifically adjudicated that the sale was valid as to the original parties, thereby recognizing title in petitioners. The same decision specifically adjudicated no right, title or claim in defendants. It is adjudged that the rights of the receiver arose out of a lease; that this Midwest lease was subsequent to case 4182; that the rights of the receiver could not be above the lease, and rights of the lessee; that the court sold that lease in full satisfaction of plaintiff Marrin's unestablished debt and all other debts of the lessee and all receivership charges. The court itself did thereby adjudge against any possible claim in the receiver thereafter. The court in the case they set up makes the receiver at time of that case, and these defendants now total strangers in right claim or demand whatsoever, and as such without legal status to question or litigate with plaintiffs, the owners in the supreme court case, and petitioners as owners herein. (See page 17 this petition and authorities cited). That case instead of being *res judicata* in favor of

defendants is in fact *res judicata* against them, excluding them from any possible claim or standing to litigate in this court.

POINT 7

FEDERAL COURT ADOPTED WRONG BODY OF THE LAW

The federal court held that under the Rules and Decisions Act, 28 U. S. C. Sec. 725, the dicta decision of the Wyoming supreme court, 61 and 62 Pac. 2d supra, denying possession to plaintiffs at that time, was *res judicata* herein and constituted the body of the law of Wyoming for them to follow. The *res judicata* of the Wyoming courts which they should have accepted and followed was the final conclusive adjudications of the Wyoming courts in cases 4182,— on appeal, 40 Wyo. 524; 42 Wyo. 214; case 1676 of the supreme court, and ancillary case 4623, with its final sale, deed and confirmation of sale to Tibbals; and case 5059 quieting title against Marrin, plaintiff in 4561. The courts in these cases had prior, exclusive, continuing jurisdiction and control of the property, and adjudicated the vested property rights to Tibbals. That was final and conclusive, in conformity to the Wyoming constitution, statutes and substantive law of Wyoming, and of the entire land, and the principles of right, justice and law. And beyond this, the Wyoming constitution, statutes and established law, as recognized, established and applied to all other citizens and litigants constituted that body of the law in cases of diversity of citizenship. But here, beyond this, federal questions were raised, and the duty of the federal court was to exercise its own independent judgment, and adjudicate the respective claims of both parties in accordance with the validity, and the force of the muniments of right, title and claim, as acquired in conformity with the constitution, statutes and law of Wyoming. These rights were fixed and accrued prior to case 4871 and said supreme court decisions. The court in the Wyoming cases attempted to violate and ignore the fixed law of Wyoming, and discriminate against plaintiffs and discriminate in favor of the receiver, and take property from plaintiffs contrary to the U. S. Consti-

tution and create in the receiver a valuable estate by judicial declaration, and act likewise forbidden by all Wyoming and federal laws. The Wyoming courts were not sitting in an appellate capacity on case 4561 and it could not collaterally adjudicate any right in alleged receiver Graham, or in creditors. All it could do was to give force to what the court had LEGALLY AND WITH JURISDICTION done in that case. The federal courts must exercise their own independent judgment thereon, and especially is this required herein where federal questions are raised, and rights must be determined under the 14th Amendment to the U. S. Constitution. And further where justice must be administered ON TRUTH INSTEAD OF FALSITY; and on RIGHT, JUSTICE AND LAW instead of VOID acts of Wyoming courts.

The federal court believed that *Erie Railroad v. Tompkins,* 304 U. S. 64 required it to accept the isolated, void, biased and arbitrary dicta declarations in the said supreme court decisions instead of the body of the law of Wyoming as it actually exists in the Wyoming constitution, statutes and substantive law of the state and as applied to all other citizens and litigants under like and similar circumstances. Under this body of the law, every issue here involved has been in said Wyoming courts, acting within their jurisdiction, and upholding the Wyoming consitution, statutes and substantive law conclusively adjudicated in favor of petitioners, and likewise in strict conformity to the U. S. Constitution and laws. But the law as construed by the federal court below is contrary to the very reasons, principles and purposes sought to be accomplished by the Rules and Decisions Act, where no U. S. constitutional or federal questions are involved. The purpose of that act was to assure to all citizens equality of law in diversity of citizenship actions in federal courts, so that there should be one law of the state, whether the litigant selected the state or the federal court. The action of the federal court below herein has absolutely destroyed that equality of law for petitioners. They are discriminated against and placed outside of

and beyond the pale of equality and protection of the Wyoming constitution, its express statutes, the established law of the state, and denied the equality of and protections of the final conclusive judgments of the Wyoming district court of Fremont County, Wyoming, and of the supreme court of Wyoming. For all other citizens of Wyoming the final judgments of the supreme court are conclusive and *res judicata,* when acting as the prior court of competent jurisdiction as in the *Tibbals* cases. For all other citizens of the state, the RULE OF PROPERTY AND OF JURISDICTION, stated in 61, and 62 Pac. 2d supra, is a vested right protected by the constitution, statutes and law of Wyoming and protected under the 14th Amendment to the U. S. Constitution, which means, that when another citizen brought and served a case similar to 4182 to establish a prior trust and have the properties appropriated thereto, that court thereby acquired the prior, exclusive continuing jurisdiction and custody and control of the properties, and that no subsequently collateral concurrent court such as 4561 had jurisdiction to hinder, delay, obstruct, defeat, modify or in any way interfere with the prior exclusive jurisdiction of the first court, and that any attempt as in case 4561 to do so is absolutely void. For all other citizens of Wyoming sec. 3-907 excludes any subsequent privy of the properties from having any adverse claims, and frees the prior litigant from taking notice or of litigating with the subsequent privy in some subsequent collateral case. For all other owners, no creditor of a lessee can claim or assert a lien to his property but such creditor is confined to the property of the lessee. For no other citizen in Wyoming can a creditor of a lessee by the simple act of filing a suit to establish a debt against the lessee avoid establishing his debt by judgment, and no receiver of the lessee can take possession of the property, either of the lessee or the owner, until he has secured a judgment establishing his debt and alleged lien, and not thereafter save as purchaser at an established lien public foreclosure sale after period of redemption has expired. For no other citizen of Wyoming would a Wyoming court declare that the RES of a receiver of a tenant consisted of

anything save the property of the tenant, which could be taken by a court and applied, as THE FUND IN COURT, to satisfy the debts of the tenant. And for no other citizen of Wyoming would a court adjudge that after a receiver of a tenant had sold the lease and other property of the lessee, in full satisfaction of all debts whatsoever of the lessee, that the receiver could afterwards go back and take possession of the owner's fee simple title, and hold it 16 years after the lease expired, and then claim and sell at private sale, the fee simple title of the owner. For no other citizen of Wyoming would a Wyoming supreme court declare that the purchase of an unexpired 6 weeks term of a lease at a receiver's sale, acquired anything other than the lease, which binds him to return possession to the lessor on expiration of the lease. For no other citizen would a Wyoming court be allowed to attack a final judicial sale by creating its own facts and jurisdiction by judicial assertion by declaring to be true facts necessary to the exercise of that jurisdiction, without the semblance in fact or truth of the basic premises so created, and when the undisputed record before that court disproved its created jurisdiction. And no other citizen of Wyoming would be required to submit to the injustice of having his vested property rights taken from him illegally, and contrary to his equal rights under the Wyoming constitution, and express statutes and established law, and handed over to another by a court which thereby created out of the property of the lawful owner, an estate in another by judicial declaration, when the party so favored was without any legal right whatsoever thereto. Further the action of the court below amounts to this, that a federal court should accept as the body of the law of the state, a VOID, BIASED, ARBITRARY decision of a state supreme court, and do this without inquiry as to voidness, of that decision. This absolutely destroys the 14th Amendment to the constitution of the United States. There is taken from the federal court all power over and duty to enforce that amendment. Likewise, the law of a state could be a legislative enactment of the state, void as in conflict with

the state constitution, and void as in conflict with the U. S. Constitution.

The jurisdiction of the court in 61 and 62 Pac. 2d supra, was a restricted jurisdiction. It must act only under the constitution and state statutes, and under the U. S. Constitution. Disregard of these renders its acts VOID. A void judgment IS NO JUDGMENT. Hence it cannot be *res judicata*. The state court above violated all three restrictions. While the ejectment action was properly brought in that case and court, its jurisdiction under the record before it was restricted to INQUIRY, as a first restriction. It could inquire if cases 4182, 4623, appellate cases thereon, case 1676, and 5059 had been had, and upon the record, the final judgments, and the official proceedings were not open to dispute. The *res judica* effect of those judgments had to be applied. Further it was restricted to inquiry as to the express statutory law governing the rights and its own jurisdiction thereunder. It could not arbitrarily disregard express statutes fxing its own jurisdiction, and the rights of Tibbals and his grantees. It disregarded both restrictions, and in so far as it did, its acts are VOID. Every act that defendants advance is a VOID act. And this court is enjoined with the duty to enforce the said 14th amendment to protect petitioners. These petitioners have been compelled to point out the voidness of case 4561. The duty was on defendants to establish by proof the validity and the alleged COMPETENT jurisdiction of case 4561, and justify the receiver, and the contract and assignment as valid. Nothing in 4561 binds Tibbals or petitioners, yet we are compelled to submit to having the acts of the court, no matter how void, cited and set up as muniments of right in defendants. The federal court below assumed facts, and assumed judicial proceedings, as that the court therein appointed Graham receiver of the properties, and that he continued in possession thereafter, and other facts all of which are untrue. And petitioners were denied the right to produce the official records to disprove them. A judgment resting on assumed falsity, when truth was offered and rejected cannot be due process of law.

"No judgment is due process of law if rendered without jurisdiction"—Citing, *Alcott v. McNeal,* 154 U. S. 34.—"Due process of law, as applied to judicial proceedings means a course of legal proceedings according to rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights"—citing *Pennoyer v. Neff,* 95 U. S. 714—"and such judgment is wholly VOID if a fact necessary to jurisdiction of the court does not exist—" citing *Old Wayne Mutual Life Ins. Co. v. McDonough,* 204 U. S. 8.

Seal v. Barnes, (Okla.) 35 Pac. 2d 704.

The court above disregarded an express statute of the state, just as the Wyoming court in 61 and 62 Pac. 2d supra, disregarded sec. 3-907, and the lien statutes of Wyoming. The judgment was TOTALLY VOID. And the Wyoming court disregarded the rule of property and of jurisdiction, the vested property right in Tibbals from March 17, 1928. It relitigated without jurisdiction. And it created its own facts and jurisdiction to attack the judicial by judicial assertion, declaring facts to be true which were untrue.

"A court even of general powers cannot acquire jurisdiction merely by asserting it or determining that it exists. The nature of the action in such case is one OF JURISDICTIONAL FACTS, and the court cannot determine in its favor the existence of jurisdiction when there is nothing to support that view." *Hall v. Wilder Mfg. Co.,* (Mo.) 293 SW 760, and citing *Hanna v. Stedman,* 230 N. Y. 326; *Pennoyer v. Neff,* 95 U. S. 714; and four other U. S. supreme court decisions.

The Wyoming supreme court, 61 Pac. 2d 282 sets out two jurisdictional requirements necessary to attack the judicial sale in 4623, as 1. Lack of jurisdiction in the court making the sale; 2. Fraud of the successful party. It then proceeded to state as its created premises that the property

was in *custodia legis,* in hands of receiver Graham at time of the Tibbals sale. This was not true, and it could not be true. It had been judicially litigated in 4623, first at insistence of receiver Graham in 4623 to resist the Tibbals special appearance and plea to the jurisdiction of the court, that the court did have jurisdiction; Then it was for the second time judicially litigated in this direct action, on special allegation of Tibbals in the answer that the property was in *custodia* of law under the Tibbals judicial proceedings in case 4182 by final judgment therein that such was true. And the rule of property and of jurisdiction, declared in the same supreme court case set up by defendants herein and as declared by the universally established law of the entire nation; and further the record in case 4561, which reveal that the court never appointed Graham as receiver for anything save the Midwest lessee, and its lease,—all disprove the self-created jurisdiction of the court to attack the sale. And likewise the established law of the entire nation that the fraud to attack a sale must be EXTRINSIC fraud, some act of the prevailing party that prevented the losing party from having his hearing, and that was not before the court, and could not by reasonable diligence have been placed before the court, establish conclusively that the self-created jurisdictional grounds for attack on the sale did not exist. And further there was no pretense of actual INTRINSIC fraud, as Tibbals consented to do the other parties a requested favor, for their own benefit, and this was approved by the court. Thus the judgment relied on by defendants in 61 Pac. 2d 279, and 61 Pac. 2d 285, in that respect was TOTALLY VOID. And due process of law is denied these petitioners. Fraud is a crime. And had Tibbals been convicted of fraud and confined in jail for extending an honorable and requested favor to the owners and Graham, would this court hesitate to grant habeas corpus and release him from such a void and biased conviction? Under the same 14th amendment, this court is duty bound to protect against the denial of equal justice and the taking of property without due process of law.

CONCLUSION

It is respectfully submitted this case shows a denial of the equal protection of the law, and a taking of property without due process of law contrary to the 14th Amendment to the Constitution of the United States, and contrary to the Constitution of Wyoming, and its statutes and substantive law. And a denial of right to a day in court and jury trial as secured by the Seventh Amendment to the U. S. Constitution, and Rules 38-39 of Federal Rules. And further that the errors of the court below are of such nature petitioners have been denied equal justice, and their property has been taken from them and handed over to defendants who have no legal claim whatsoever thereto; and that the court below has erroneously adopted the wrong body of the law to be applied in diversity of citizenship actions; and that it has erroneously failed to exercise its own independent judgment, and adjudge the issues in accordance with the validity, force and effect of the property rights involved as evaluated under the constitution, statutes and substantive law of Wyoming and established procedure of both Wyoming and of the United States; and has erroneously failed to inquire into the federal questions involved and accord petitioners their just rights thereunder. The judgment of the court of appeals affirming the judgment of the federal district court granting summary judgment should be reversed. And it is further submitted that since the decisions of the Wyoming court, 61 and 62 Pac. 2d, supra, on which defendants rely, disclose a total lack of any possible legal claim of right in the receiver or in defendants to the properties involved; and reveal defendants as total strangers in right, without legal status to question or litigate with petitioners, their alleged but disproven claim of right, this court may well in reversing the judgment of the court of appeals direct that judgment for possession, and title be entered for petitioners, with the issue as to damages and other relief to be determined by the U. S. District court below under the rule of *Guffey v. Smith,* 237 U. S. 119, or other proper rule; and if this be not proper that the judg-

ment below be reversed and the case be tried on the issues of the pleading, on evidence, with a day in court to petitioners, and their right to a demanded jury trial, or such other and proper relief as may be right and proper.

And it is respectfully submitted, with the solemn contention that the preservation of the 14th Amendment to the constitution of the United States, and the American concept of justice, with equality, founded on truth, and right, and the dictates of natural justice is now before the Worthy, Honorable, Chosen Court,—not to hesitate, falter or fail in the preservation of this sacred heritage to all mankind. God Save the Court, to Save the Constitution.

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